84-6859

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-

RONALD DERAY SKIPPER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

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QUESTIONS PRESENTED

I.

IN THIS CAPITAL CASE, DID THE EXCLUSION OF MITIGATING EVIDENCE TENDING TO SHOW THAT PETITIONER WOULD PROBABLY MAKE A FAVORABLE ADJUSTMENT TO PRISON IF HIS LIFE WAS SPARED VIOLATE PETITIONER'S RIGHTS UNDER LOCKETT V. OHIO AND EDDINGS V. OKLAHOMA?

II.

DID THE SOUTH CAROLINA SUPREME COURT'S FAILURE TO APPLY FEDERAL CONSTITUTIONAL STANDARDS TO THE DETERMINATION THAT A TRIAL COURT'S EXCLUSION OF EVIDENCE IN VIOLATION OF LOCKETT V. OHIO COULD BE DISREGARDED AS HARMLESS VIOLATE PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS?

III.

DOES THE SOUTH CAROLINA SUPREME COURT'S CONTINUING DISREGARD OF THIS COURT'S DECISIONS CONCERNING THE SCOPE OF MITIGATING EVIDENCE ADMISSIBLE IN CAPITAL SENTENCING PROCEEDINGS WARRANT REVIEW BY CERTIORARI?

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STATE OF SOUTH CAROLINA,

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioner Ronald Deray Skipper prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported as State v. Skipper, ___ S.C. ___, 328 S.E.2d 58 (1985), and is reproduced in the Appendix to this petition at A-1 to A-5. The per curiam order of the Supreme Court of South Carolina dated April 3 , 1985, denying petitioner's timely petition for rehearing is unreported, and is reproduced infra at A-6.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on February 12, 1985. A timely petition for rehearing was denied on April 3, 1985. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the Constitution

of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

It further involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> "[N]or shall any state deprive any person of life . . . without due process of law . . ."

2. This case also involves S.C. Code §§16-3-20 et seq. (1984) which provide in pertinent part:

> §16-3-20 (A) A person who is convicted or pleads guilty to murder shall be punished by death or by imprisonment for life . . .
>
> (B) Upon conviction . . . of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or to life imprisonment. . . . In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of punishment. . . .
>
> (C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any . . . statutory aggravating and mitigating circumstances which may be supported by the evidence. . . .

STATEMENT OF THE CASE

As summarized by the South Carolina Supreme Court, the facts of the crime for which petitioner Ronald D. Skipper was convicted and sentenced to death are as follows:

> On the evening of November 1, 1982, Maryanne Wray (victim) went with two friends to the Rainy Day Inn in Garden City. Around 11:00 p.m. she left with Appellant, telling her friends that they were going to the beach. Later, her friends saw Appellant and the victim on the beach, embracing. When she did not return to the Inn, the friends left around 2:00 a.m.
>
> The victim's body was found the next morning at a house near the Garden City pier; she had been strangled.

State v. Skipper, ___ S.C. ___, 328 S.E.2d 58, 59 (1985).

Following discovery of Ms. Wray's body, witnesses identified petitioner as the person seen kissing her on the beach shortly before her disappearance. He was arrested several days later and charged with her murder. Petitioner pled not guilty and was convicted by a jury of murder and first degree criminal sexual conduct.

Two days after the guilty verdicts were returned, a sentencing hearing was conducted before the trial jury pursuant to the

provisions of S.C. Code §16-3-20 (1984 Cum. Supp.) for the purpose of determining whether petitioner should be sentenced to life imprisonment or to death by electrocution. Immediately before the beginning of the testimony at the sentencing hearing, the trial judge asked defense counsel to specify the statutory mitigating circumstances on which petitioner relied. Counsel responded by stating, among other things, that

> [t]he general mitigating circumstances, of course, will be the biographical life of the defendant, his ability to be rehabilitated. In that regard we have subpoened two jail guards, and Mrs. Carolyn Henry who is a visitor in the jail on a regular basis, and has conferred with the defendant once a week since his confinement.

Counsel conceded at this juncture that certain decisions of the South Carolina Supreme Court had indicated that "the ability of the defendant to adjust to a life sentence or to extended confinement in custody . . . was not relevant."[1] As defense counsel began to explain his position with regard to this evidence, the trial judge interrupted him and stated that he would rule on the admissibility of the evidence at the proper time. State v. Skipper, supra, Transcript of Record (hereinafter cited as "Tr.") at 1000-1001.

The prosecution then proceeded to introduce in aggravation of petitioner's punishment court records and testimony to show that he had been convicted of criminal sexual conduct on several occasions in the past. After this evidence had been received, petitioner was afforded an opportunity to present evidence in mitigation.

The first witness to testify in mitigation was petitioner himself. While most of his testimony concerned his family background and his problems with drugs, he did mention that he had been free of drugs since the beginning of his incarceration nearly eight

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[1]As will be discussed below in greater detail, the primary case to which counsel was referring was State v. Koon, 278 S.C. 578, 298 S.E.2d 769 (1982). In Koon, which was decided about six months before petitioner's trial, the South Carolina Supreme Court upheld the exclusion (by the same trial judge as presided in petitioner's case) of mitigation testimony by a psychiatrist to the effect that the defendant would in all likelihood prove adaptable and nonviolent in prison if given a life sentence. The factual and legal background to this decision is summarized in Patterson v. South Carolina, 53 U.S.L.W. 3736 (1985) (Marshall, J., dissenting from denial of certiorari).

months prior to the trial. He also stated that if he were given a life sentence rather than sentenced to death, he hoped that he would able to work in prison and help support his family. Tr. 1033-1034, 1040. He stated that he had had some disagreements with the jail authorities immediately after his arrest over his right to make phone calls and to have his personal belongings, but that after this initial period he had gotten along well with the custodial staff at the jail. Tr. 1035-1036. The prosecutor's cross-examination of petitioner ended with the following exchange:

> Q. You are the fellow that when you got to the Horry County jail went to kicking the cell, right?
>
> A. Yes, sir.
>
> Q. That's you. That's the kind of fellow you are, but you are nice today, right?
>
> A. (No response).
>
> MR. DUNN (prosecuting attorney): I have no further questions.

Tr. 1065-1066.

Petitioner's next witness in mitigation was his ex-wife, Pamela Anderson Skipper. Mrs. Skipper described petitioner as the product of a violent and turbulent home life, and related a history of drug and alcohol dependence and emotional disturbance. She also related that petitioner suffered from nightmares which were the aftermath of his having been repeatedly raped in prison while serving a Youthful Offender sentence for statutory rape. Tr. 1073-1074. Later in her testimony she recounted petitioner's efforts to seek treatment for his psychiatric problems. Mrs. Skipper described petitioner as having been "upset" when he was first arrested for Ms. Wray's murder, and she recounted her unsuccessful efforts to visit him early in his incarceration. At this juncture, the following exchange occurred:

> Q. [by Mr. Dusenbury, defense counsel]: Now, since that period when you and Ronny were upset, I ask you whether or not what type of adjustment he made to prison life?
>
> A. He has made a good adjustment.
>
> Q. What is your opinion as to whether or not he could be---

MR. DUNN: Object to, "What is your opinion." It can't be relevant. She is not qualified as an expert of any kind.

THE COURT: Mr. Dusenbury?

MR. DUSENBURY: I think she is well qualified

THE COURT: Let's hear the rest of your question and then I will decide.

Q. What is your opinion from your knowledge of Ronny and his reaction to authority under the present conditions, and under prison conditions over an extended period of time: what is your opinion as to whether he could make a good adjustment?

THE COURT: Objection sustained.

MR. DUSENBURY: Your Honor, we would like to take up a matter of law outside the presence of the jury.

THE COURT: I refer you to the case of State against Koon. I am familiar with the law. . . .

(The following took place outside the presence of the jury.)

THE COURT: In the case of State versus Koon it says, "Appellant next alleges that the trial court erred by excluding certain psychiatric evidence concerning his future adaptability to jail. We disagree. The penalty phase of a capital murder trial is concerned with the existence [or] nonexistence of mitigating or aggravating circumstances involved in or arising out of the murder, not the convicted murderer's adaptability to prison life."

MR. DUSENBURY: Your Honor, we have under subpoena two jailers, Mr. Fritz Collins, Mr. Ronny Johnson, and a regular visitor Carolyn Henry to testify that the defendant has made a good adjustment.

THE COURT. Whether he can or cannot, State versus Koon says it is not an issue in this case.

MR. DUSENBURY: Even if they state after this initial period he has made a good adjustment?

THE COURT: Read State versus Koon. That is not an issue, whether he can adjust or not adjust.

MR. DUSENBURY: So none of these witness[es] will be permitted to testify?

THE COURT: I don't know what they are going to say, but I am telling you they will not be permitted to testify about his adjustability to prison life.

MR. DUSENBURY: That is the only thing we would offer them for. Thank you, Your Honor.

THE COURT: Anything further?

MR. DUSENBURY: No, sir.

THE COURT: Give us the jury, please.

Tr. 1095-1098.

After this ruling excluding the testimony of the jail guards and of Mrs. Henry, petitioner called as mitigation witnesses his mother, sister and one additional family member. Their testimony consisted largely of descriptions of petitioner's traumatic childhood and adolescence in a home environment dominated by alcoholism and continuous domestic violence. None of these witnesses gave any testimony concerning petitioner's conduct in jail during the preceding eight months, although petitioner's mother did state, as had petitioner, that he had been free of drugs since the start of his pretrial confinement. Tr. 1148. During the testimony of another family member, Mrs. Hazel F. Oliver, petitioner's counsel acknowledged that the trial judge had "already ruled on adjustment," and when the trial judge confirmed this, counsel concluded his examination without asking the witness any questions concerning petitioner's adjustment to prison. Tr. 1120. After these witnesses had testified, petitioner rested his case in mitigation.

In sum, the result of the trial judge's ruling excluding the testimony of the two jail officers and Mrs. Henry, petitioner's jail visitor, was that no favorable testimony concerning petitioner's conduct or adjustment in jail was introduced on his behalf, with the exception of the testimony of petitioner's ex-wife and of petitioner himself. In his argument to the jury--knowing perfectly well that the trial judge had excluded three impartial witnesses from testifying on petitioner's behalf concerning his adjustment to confinement--the prosecutor made the following statement:

> What kind of fellow is he? He told you, not me, something about an unlawful weapon. He was the lookout man in a stealing case when he was very young. Been in trouble all his life in some way or other. His wife said he told her -- I didn't hear anybody else say it. He told her . . . that he had been raped in prison. With his history and what you know about him, who do you think the raper was and who do you think the rapee was? And if given the opportunity again with this four time sexual abusing loser, who do you think will get raped in prison? Will it be Ronald Skipper, big old Ronald Skipper who knocks woman [sic] in the side of the head, or will it be some little boy in prison?

Tr. 1201-1202. Later in his argument, while reviewing the list of mitigating circumstances submitted by petitioner for the

jury's consideration, the prosecutor noted that petitioner claimed to have "'shown significant and positive adjustments to confinement, and education and employment skills that enable him to be a stable and productive prisoner.'" The prosecutor responded to this assertion by recalling the one instance of petitioner's bad conduct in pretrial confinement to which he had admitted on cross-examination, and suggested that this incident revealed petitioner's likely future conduct in prison:

> Didn't he admit kicking on the bars over there? That's the kind of prisoner he is. Kicking on the bar. Kicking on the bars. . .

Tr. 1213. After hearing arguments of counsel and the judge's sentencing charge, the jury deliberated about ninety minutes before returning a binding recommendation of death.

On appeal to the South Carolina Supreme Court, petitioner alleged, inter alia, that the trial court's exclusion of the mitigation testimony of the jail guards and of Mrs. Henry concerning petitioner's good adjustment to confinement during the eight months between his arrest and his trial violated the Eighth Amendment principle enunciated in Lockett v. Ohio, 438 U.S. 586 (1978). Brief of Appellant at 54-57. The South Carolina Supreme Court rejected this argument, and affirmed petitioner's convictions and death sentence. The state supreme court's response to his Lockett argument, in its entirety, consisted of the following:

> Next, Appellant charges error in the refusal of the trial judge to permit testimony of Appellant's adjustment to prison life. We disagree.
>
> The trial judge properly refused to admit evidence of Appellant's future adaptability to prison life. State v. Koon, [278 S.C. 578, 298 S.E.2d 769 (1982)]. However, evidence of his past adaptability was admitted through testimony of his former wife, his mother and his own testimony. This contention is without merit.

State v. Skipper, ___ S.C. ___, 328 S.E.2d 58, 61-62 (1985)

Petitioner's timely petition for rehearing was denied without opinion by the South Carolina Supreme Court on April 3, 1985. On April 9, the state supreme court granted a stay of execution in order to permit the filing and disposition of this petition for a writ of certiorari.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

As set forth in the preceding statement, petitioner attempted unsuccessfully to present to the sentencing jury the testimony of two jail officers and a regular jail visitor to show his good conduct and adjustment to confinement over an extended period of time. He assigned the exclusion of this evidence as error on appeal in the South Carolina Supreme Court, State v. Skipper, ___ S.C. ___, 328 S.E.2d 58 (1985), Exception No. 16, Tr. 1324, and alleged that the actions of the trial judge violated petitioner's Eighth Amendment rights under Lockett v. Ohio, 438 U.S. 586 (1978).[2] The South Carolina Supreme Court denied his Lockett claim on the merits. Relying on its prior decision in State v. Koon, supra, the state supreme court held that petitioner's future adaptability to prison life was irrelevant to the jury's sentencing decision. While implicitly recognizing that the exclusion of the jail officers' and visitor's testimony was error to the extent that the excluded testimony bore on his past record of good conduct, see State v. Koon, Opinion No. 22075 (S.C., April 3, 1984), cert. denied, 53 U.S.L.W. 3736 (April 15, 1985); State v. Stewart, ___ S.C. ___, 320 S.E.2d 447 (1984), the court held that the death sentence could stand because petitioner's jail record had been presented to the jury by his own testimony and that of his sister and mother. State v. Skipper, ___ S.C. ___, 328 S.E.2d 58, 61-62 (1985).

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[2]The fact that petitioner's counsel did not specify a constitutional basis for his proffer of the excluded evidence at trial is of no consequence, since the South Carolina Supreme Court does not recognize procedural forfeiture in capital cases, and considers all trial errors in favorem vitae regardless of whether they were timely raised at trial or even on appeal. State v. Gilbert, 273 S.C. 690, 258 S.E.2d 890 (1979) (reversing death sentence due to improper prosecution argument; no objection at trial or on appeal); State v. Woomer, 277 S.C. 170, 284 S.E.2d 357 (1981) (reversing conviction due to improper cross-examination; no objection at trial); State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981) (same); State v. (James) Butler, 277 S.C. 452, 290 S.E.2d 412 (1982) (improper prosecution jury argument on guilt and punishment; no objection at trial); State v. Norris, Opinion No. 22264 (S.C., March 25, 1985) (erroneous instructions on parole eligibility; no objection at trial).

WHY THE WRIT SHOULD BE GRANTED

1. South Carolina's continuing deviation from Lockett.

Over the past year, the South Carolina Supreme Court has upheld a series of death sentences despite their having been imposed in plain violation of this Court's holding in Lockett v. Ohio, 438 U.S. 586 (1978) that

> the sentencer, in all but the rarest kind of capital case, [may] not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 604 (emphasis in original); Eddings v. Oklahoma, 455 U.S. 104 (1982). Two members of this Court have recently expressed the view that this pattern of Lockett errors is such as to merit the intervention of the Court in the exercise of its certiorari jurisdiction. Patterson v. South Carolina and Koon v. South Carolina, 53 U.S.L.W. 3736 (April 15, 1985) (Marshall and Brennan, JJ., dissenting from denial or certiorari). It has now become apparent that the South Carolina Supreme Court's decisions in Patterson and Koon were not minor or isolated instances of a departure from Lockett, but signify a continuing and deepening divergence between the administration of the death penalty in South Carolina and the constitutional commands of this Court's precedents.

As noted in the dissenting opinion in Patterson, the genesis of the current series of Lockett violations was the South Carolina Supreme Court's holding in State v. Koon, 278 S.C. 578, 298 S.E.2d 769 (1982) (Koon I). The pertinent portion of Koon I--most of which was read to defense counsel by the trial judge in ruling upon his evidentiary proffer at petitioner's trial--is the following:

> Appellant next alleges that the trial court erred by excluding certain psychiatric evidence concerning his future adaptability to jail. We disagree. The penalty phase of a capital murder trial is concerned with the existence or nonexistence of mitigating or aggravating circumstances, not the convicted murderer's adaptability to prison life. The jury is concerned with the circumstances of the crime and the characteristics of the individual defendant as they bear logical relevance to the crime. In Lockett v. Ohio, cited as controlling in Eddings v. Oklahoma, the United States Supreme Court retained the court's traditional authority to exclude irrelevant evidence which did not bear on a defendant's character, prior record, or the circumstances of his offense. We conclude that the evidence of appel-

lant's future conformity to prison life was properly excluded as irrelevant.

Id., 298 S.E.2d at 773-774.

In a number of cases tried after Koon I, including this one, South Carolina trial judges applied this language from Koon I to exclude not only evidence of capital defendants' probable future good behavior in prison, see State v. Chaffee, Opinion No. 22182 (S.C., Nov. 13 1984), cert. denied, 105 S.Ct 1878 (1985), but also evidence bearing on defendants' actual past record of good behavior while incarcerated. State v. Elmore, Opinion No. 22322 (S.C., May 16, 1985), State v. Patterson, ___ S.C. ___, 327 S.E.2d 650 (1984), cert. denied, 53 U.S.L.W. 3736 (April 15, 1985); State v. Stewart, ___ S.C. ___, 320 S.E.2d 447 (1984). These evidentiary rulings continued to be made for nearly a year after petitioner's trial until, in State v. Koon, Opinion No. 22075 (S.C., April 3, 1984), cert. denied, 53 U.S.L.W. 3736 (April 15, 1985) (Koon II), the South Carolina Supreme Court modified its prior decision in Koon I by holding a defendant's prior prison record to be admissible as general evidence of his character.

Koon II did not, however, modify the South Carolina Supreme Court's view first stated in Koon I that a defendant's likely future behavior in prison is an irrelevant consideration for capital sentencing, and that psychiatric and other evidence relating to a defendant's future nondangerousness in prison is inadmissible. Apparently for this reason, the court has declined to reverse any death sentence because of the erroneous exclusion of evidence of a defendant's record of good conduct in prison so long as some evidence of the defendant's good character was admitted. Thus, in State v. Patterson, supra, the court upheld a death sentence despite the erroneous exclusion of the testimony of three prison guards and a psychiatrist on the grounds that the excluded testimony concerning the defendant's excellent prison record would have been "cumulative" to general character testimony of three family members, a former employer, and a neighbor and a minister who had both known the defendant as a child. Similarly, in State v. Elmore, Opinion No. 22322 (S.C., May 16, 1985), the

court held the erroneous exclusion of the testimony of three prison guards concerning the defendant's prison record and rehabilitative potential to have been "harmless beyond a reasonable doubt" because the jury was permitted to hear general character testimony from the defendant's mother and four older sisters. In Elmore, the court cited its opinion in the present case as authority for its conclusion that the officers' testimony was legally irrelevant and properly excluded to the extent that it bore on his "rehabilitative characteristics." However, the court found the exclusion of the officers' testimony concerning his past behavior and character to have been error, albeit harmless. It went on to explain the analysis which had led to its conclusion that the error did not require reversal of the death sentence.

> At trial, appellant's mother and four sisters testified as to his character. They testified that he was a good boy who never got into trouble. One sister testified that he was not violent, and another stated he could not have committed the murder "unless his mind snapped."
>
> Appellant contends our prior findings of harmless error beyond a reasonable doubt were predicated on a showing that other testimony described a defendant's prison conduct. Such reliance is misplaced. While our earlier cases may be factually distinguished, they are based upon a simple proposition -- whether a defendant had an ample opportunity to present nonstatutory mitigating circumstances.
>
> It is clear appellant presented a sufficient amount of testimony in mitigation; therefore, error in excluding the proffered testimony was harmless beyond a reasonable doubt.

Id.

This passage from State v. Elmore reveals the patently unconstitutional nature of the South Carolina Supreme Court's mode of analysis of the Lockett violations involved in this case. The error which the state supreme court committed here has two components. First, the court's repeated insistence that a capital defendant's adaptability and likely future good conduct in prison is irrelevant as a matter of law is in direct conflict with this Court's death penalty decisions from Woodson v. North Carolina, 428 U.S. 280 (1976) and Jurek v. Texas, 428 U.S. 262 (1976) through Lockett v. Ohio, supra, and Eddings v. Oklahoma, 455 U.S. 104 (1982), to Barefoot v. Estelle, 463 U.S. 880 (1983) and

California v. Ramos, 463 U.S. 992 (1983). Secondly, the South Carolina Supreme Court's expressed determination to treat the erroneous exclusion of whole categories of relevant and admissible mitigating evidence as "harmless" so long as the defendant was allowed to present any sort of mitigating evidence at all is irreconcilable both with this Court's repeated insistence upon the need for particular care and accuracy in capital sentencing decisions, Woodson v. North Carolina, supra at 304-305, Gardner v. Florida, 430 U.S. 349, 357-358 (1977), Beck v. Alabama, 447 U.S. 625, 637-638 (1980) and with long-established principles governing the determination that a given federal constitutional error may be disregarded as harmless. Chapman v. California, 386 U.S. 18 (1967).

2. The South Carolina Supreme Court's prohibition of evidence of a defendant's future adaptability to prison plainly violates the Eighth Amendment principle of Lockett v. Ohio.

For a jury charged with deciding whether a particular defendant should be executed or committed to prison for life, the relevance of his actual conduct in jail over a substantial period of time immediately preceding his sentencing hearing is self-evident, both for the light which this conduct sheds on his character, and for the bearing which the defendant's prison record may have on the likelihood of his committing violent or unlawful acts in the future. See, gen., Barefoot v. Estelle, supra, California v. Ramos, supra. That such predictions play an important role in capital sentencing decisions has been frequently recognized. Barefoot v. Estelle, supra, Estelle v. Smith, 451 U.S. 454 (1981); and see Eddings v. Oklahoma, 455 U.S. 104, 121 (1982) (Burger, C.J., dissenting). To be sure, South Carolina law does permit the prosecution to introduce psychiatric predictions of capital defendants' likely future dangerousness. State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982), cert. denied, 103 S.Ct. 3572 (1983). Thus South Carolina's refusal to permit a jury to consider evidence bearing on capital defendant's probable nondangerousness in a prison environment is based not on any concern for the

accuracy or reliability of such determinations, cf. People v. Murtishaw, 29 Cal.3d 733, 175 Cal. Rptr. 738, 631 P.2d 446 (1982), but rather on its view that a convicted murderer's likely good conduct in prison is itself irrelevant to the jury's sentencing decision. Koon I, supra, State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627, cert. denied, 104 S.Ct. 3560 (1984), State v. Chaffee, Opinion No. 22182 (S.C., Nov. 13, 1984). As noted above, the South Carolina Supreme Court has reached this conclusion on the basis of its reasoning that a capital sentencing jury is concerned with the characteristics of the defendant only "as they bear logical relevance to the crime" for which he has been convicted. Koon I, supra According to the South Carolina court, a capital defendant's potential for a successful adjustment to life in prison is irrelevant to the determination of his sentence because of "the lack of logical connection between adaptability to confinement and the specific personality or character traits which were instrumental in leading the defendant to commit the particular crime at issue." State v. Plath, supra, 313 S.E.2d at 627.

What the South Carolina Supreme Court's unduly narrow and crime-focused view of relevancy overlooks is the possibility that a sentencing jury's perception of whether a convicted murderer would pose an unreasonable risk of further acts of violence if permitted to live in prison might reasonably influence its decision to take or spare his life. A convicted murderer's probable future conduct is an entirely proper consideration in any sentencing decision, California v. Ramos, supra, and where the jury's choice is between death and life imprisonment, the likelihood that a particular defendant would prove co-operative and nonviolent in a prison environment is especially germane. Thus the South Carolina Supreme Court's prohibition of such evidence--at least where the evidence is favorable to the defendant, cf. State v. Woomer, supra--cannot be reconciled with the command of the Eighth Amendment that "[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." Jurek v. Texas, 428

U.S. 262, 271 (1976). In sum, it is obvious that South Carolina's prohibition of testimony concerning a capital defendant's probable good conduct in prison violates the Eighth Amendment holdings of this Court. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982).

3. The South Carolina Supreme Court's assessment of the effect of the Lockett errors in this case.

For the reasons set forth above, the state court's analysis of the Lockett issue in this case was controlled by a legal principle--Koon I's prohibition of evidence of a convicted murderer's probable good conduct in prison--which is itself violative of Lockett. For this reason, the South Carolina Supreme Court failed to identify correctly the Lockett errors which actually occurred here. While the state supreme court did not disagree with petitioner's claim that his three jail witnesses were erroneously barred from testifying, it implicitly adhered to its line of cases holding that such evidence is admissible only to show general good character rather than to establish the likely future conduct of a capital defendant in prison. State v. Elmore, supra.

Moreover, having created an artificial and constitutionally untenable distinction between evidence of petitioner's past good record in jail and evidence tending to prove his likely future good conduct in prison, the state supreme court compounded its error by its cursory treatment of whether his past good conduct had been adequately established. The state supreme court's consideration of this question comes nowhere near to the "thorough inquiry" required by federal constitutional standards of harmless error review. Francis v. Franklin, 53 U.S.L.W. 4495, 4500 n.10 (U.S., April 29, 1985). The state court correctly noted that petitioner himself and his ex-wife were permitted to give favorable characterizations of petitioner's conduct in jail. But the bias of these witnesses was self-evident, and the jury might well have

given little or no weight to their testimony on this point.[3] Moreover, petitioner's own testimony was undermined by the prosecutor's cross-examination concerning one incident of misbehavior at the beginning of his incarceration. The state court gave no consideration to the possible effect of the prosecutor's impassioned claims in his summation that petitioner would probably rape other inmates if sentenced to prison, and that his one act of misbehavior in jail should be taken as an accurate guide to his likely behavior in prison. Nor does the court appear to have considered the fundamental unfairness, in the face of these predictions by the prosecution, of the trial judge's refusal to permit petitioner to call as witnesses neutral and impartial jail officials who could have rebutted the state's assertions by establishing that petitioner's conduct in jail over a long period of pretrial detention had actually been good. See Green v. Georgia, 442 U.S. 95 (1979). Under these circumstances, it is simply untenable to suggest, as did the South Carolina Supreme Court, that the exclusion of the testimony of petitioner's jail witnesses could have made no difference because the jury was permitted to hear petitioner's self-serving testimony addressed to the same point, along with that of his ex-wife.

In summary, the excluded testimony would have permitted petitioner to attempt to persuade the jury, through the well-grounded and impartial testimony of two law enforcement witnesses and of a regular visitor not related to petitioner, that he could be allowed to live in prison without any undue risk of further acts of violence. What the jury heard instead were a petitioner's own self-serving opinion, and a single conclusory statement by his ex-wife, who was testifying on the basis of little or no direct knowledge of petitioner's actual behavior in jail. Thus even if the state supreme court were correct in its often-repeated view that this entire subject was relevant only as it bore on a capital

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[3]The court's statement that appellant's mother also testified to his past adaptability to prison appears to be wholly unsupported by the record, except insofar as she stated that he had been off drugs since his arrest. Tr. 1148.

defendant's general character and not as evidence of his future conduct in prison, it is apparent that the court's conclusion that petitioner's past prison conduct was adequately established by other testimony so as to render harmless the exclusion of the three jail witnesses is not supported by the record, and does not reflect compliance with any recognizable federal constitutional standard of harmless-error review.

4. The need for a standard by which to assess "harmlessness" of violations of Lockett v. Ohio.

To the extent that the South Carolina Supreme Court recognized the presence of any error at all in the trial judge's exclusion of petitioner's jail witnesses, it treated the matter as a mere state law evidentiary error, and neither considered nor applied any federal constitutional standard to its determination of whether the error could be disregarded as harmless. Because this Court has not yet expressly considered the interrelation between Lockett and the "harmless constitutional error" doctrine of Chapman v. California, 386 U.S. 18 (1967), petitioner submits that this case provides an appropriate occasion to consider this important question.

In Chapman v. California, supra, the Court held that, with certain exceptions, constitutional error could be disregarded as harmless so long as the state, as beneficiary of the error, was able "to prove beyond a reasonable doubt that the error complained did not contribute to the verdict obtained." 386 U.S. at 24. However, the Court cautioned that this federal harmless constitutional error rule would not permit courts "to treat as harmless those constitutional errors that 'affect substantial rights' of a party," id. at 23, quoting Fahy v. Connecticut, 375 U.S. 85 (1963). Accord, Harrington v. California, 395 U.S. 250, 254 (1969) ("We do not suggest that, if evidence bearing on all the ingredients of the crime is tendered, the use of cumulative evidence, though tainted, is harmless error.").

As an initial matter, it is plain that the importance of the objectives which the rule of Lockett v. Ohio seeks to safeguard

requires that no lesser standard than that of Chapman v. California be applied to assess whether actual Lockett violations may be disregarded as harmless. As this Court has held on many occasions since Gregg v. Georgia, 428 U.S. 153 (1976), the severity and irrevocability of death as punishment creates a special need for particular reliability in the decision to impose a death sentence in a particular case, Woodson v. North Carolina, 428 U.S. 280, 305 (1976), and renders unconstitutional any procedure which creates an unnecessary risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. 586, 605 (1978). Given the gravity of the sentencing decision and the "vital importance to the defendant and to the community" that capital sentencing decisions "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 356, 358 (1977), it is plain that any standard of appellate review less demanding than that prescribed by Chapman will be inadequate to the task of "ensur[ing] that the death penalty was not erroneously imposed" as a consequence of constitutional error. Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring). See also, Gardner v. Florida, 430 U.S. 356, 362 (1977); Zant v. Stephens, 462 U.S. 862, 885 (1983).

In view of the nature of the Eighth Amendment interests protected by Lockett, it is clear that if any violations of that rule may be tolerated at all, they must at the very least satisfy the rigorous scrutiny mandated by Chapman. This leads to the question of whether and how Chapman may be applied to Lockett violations.

In answering this question, it is essential to keep in mind the fundamental difference between the nature of the jury's decision with respect to a criminal defendant's guilt or innocence and its task of determining whether or not to impose a sentence of death. Zant v. Stephens, supra, 103 S.Ct. at 2754-2755 (1983) (Rehnquist, J., concurring). In any criminal trial, the jury is required to convict a defendant once it finds that the evidence

has demonstrated his guilt beyond a reasonable doubt. It is for this reason that an examination of the record will usually reveal whether "there is a reasonable possibility that the [constitutional error] contributed to the verdict." Schneble v. Florida, 405 U.S. 427, 432 (1972). But under South Carolina's death penalty sentencing statutory complex, the discretionary and relatively unstructured nature of the jury's sentencing decision makes such a determination virtually impossible. No quantum of evidence may ever suffice to require a jury to impose a death sentence. Woodson v. North Carolina, 428 U.S. 280 (1976), State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979). South Carolina juries are not required to state their reasons for declining to impose a sentence of death, S.C. Code §16-3-20(C) (1983 Cum. Supp.), and may impose a life sentence on the basis of any aspect of the case which it sees fit to consider. State v. Copeland, 278 S.C. 572, 300 S.E.2d 63, 74 (1982), cert. denied, 460 U.S. 1103 (1983). Like the Georgia sentencing scheme considered in Gregg v. Georgia, 428 U.S. 153 (1976) and Zant v. Stephens, supra, South Carolina's sentencing procedure does not require the jury to balance aggravating and mitigating factors against one another, State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 629, cert. denied, 104 S.Ct. 3560 (1984), but consigns the ultimate sentencing decision to the jury's unfettered discretion once one or more statutory aggravating circumstances have been established. The jury's sentencing recommendation is binding upon the trial judge, State v. Shaw, 273 S.C. 194, 255 S.E.2d 799, 802, cert. denied, 444 U.S. 957 (1979), and while the sufficiency of the evidence to support a death sentence is reviewed on appeal by the state supreme court, S.C. Code §16-3-25(C) (1983 Cum. Supp.), that court does not undertake to redetermine or reweigh the factors underlying the jury's sentencing recommendation, so long as that recommendation is supported by any reasonable view of the evidence. See e.g., State v. Adams, 279 S.C. 228, 306 S.E.2d 208, cert. denied, 104 S.Ct. 558 (1983) ("the jury had ample opportunity to weigh all of the evidence as might relate to mitigating circumstances").

Thus, because the jury "is free to consider a myriad of factors to determine whether death is the appropriate punishment," California v. Ramos, supra, 103 S.Ct. at 3456 (1983), any attempt to identify whether constitutional error in the exclusion of relevant mitigating evidence from a capital sentencing proceeding may have contributed to the sentencing verdict is fraught with insurmountable difficulties. Other states have implicitly recognized the virtual impossibility of determining the effect of such error by reversing death sentences so infected without consideration of prejudice. See, e.g., Cobb v. State, 244 Ga. 344, 260 S.E.2d 60, 69 (1979) (exclusion of testimony of defendant's wife was reversible error even though evidence was somewhat cumulative, "because of the unlimited and undefined nature of mitigating evidence"); Romine v. State, 251 Ga. 208, 305 S.E.2d 93, 100-102 (1983); Simmons v. State, 491 So.2d 316, 320 (Fla. 1982) (exclusion of psychiatric evaluation of defendant's capacity for rehabilitation); Miller v. State, 332 So.2d 65 (Fla. 1976) (denial of continuance to permit psychiatric testimony in mitigation). While these decisions appear to rest on state law, they accurately reflect the difficulty of determining whether the jury's sentencing decision would necessarily have been the same had all relevant mitigating evidence been considered.

This is not to say that any exclusion of mitigating evidence must necessarily trigger reversal under Lockett. Obviously, the federal constitution does not limit the authority of state trial courts to exclude evidence which is truly cumulative, in the sense that it duplicates other evidence of the same kind proving the same point. Purcell Envelope Co. v. United States, 48 Ct.Cl. 66, 73 (1913); McCabe v. Saxon, 184 S.C. 158, 191 S.E. 905 (1937). Thus, for example, if the trial court had admitted the testimony of the three jail witnesses proffered by petitioner, Lockett would not have been violated by the exclusion of the identical testimony of a fourth or fifth such witness. Cobb v. State, 244 Ga. 344, 260 S.E.2d 60, 71 (1979) (Lockett and state law do "not imply. . . that the judge, in his discretion

and inherent power to control the progress of trials, cannot limit the introduction of an endless quantity of cumulative testimony . . ."); and see Brooks v. Francis, 716 F.2d 780, 791-792 (11th Cir. 1983) (no Lockett violations where mitigation witnesses were ultimately permitted to give the testimony for which they were called, despite frequent objections by prosecution).

These elementary principles of trial procedure, however, have nothing to do with harmless error, for where only genuinely cumulative testimony is excluded, the trial court has not committed any error at all. The question presented by this case is entirely different. Here, an entire category of witnesses were erroneously excluded. No genuinely comparable evidence was presented to or considered by the jury, and the prosecution took advantage of the exclusion of petitioner's mitigating evidence to imply that petitioner's jail record had actually been bad, and that he would probably prove an ill-behaved and dangerous prison inmate if given a life sentence. Under such circumstances, a reviewing court simply cannot conclude, with the certainty that the Eighth and Fourteenth Amendment require, that the jury's sentencing verdict would have necessarily been the same had all the facts been revealed at trial. The record does not and cannot exclude the possibility that petitioner's death sentence was imposed in part because the jury feared that imposition of a life sentence would provide insufficient protection to society against the impulsive violence which petitioner had manifested in the various crimes of which he had been convicted, and in his misconduct at the jail immediately after his arrest.[4] Testimony from jail

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[4]The importance of such considerations in the decision to impose the death penalty cannot be underestimated. A recent national public opinion survey concerning attitudes toward capital punishment reveals that Americans' most frequently-cited justification for the death penalty was the incapacitation of the convicted murderer himself, and the elimination of any danger that he might kill again. L. Kilman, "Penalty--Deter, Protect Society, Most Say," Associated Press, Jan. 29, 1985. While such considerations are undeniably proper and relevant in any capital sentencing proceeding, see, e.g., Jurek v. Texas, 428 U.S. 262, 274-276 (1976), Coker v. Georgia, 433 U.S. 584, 605-606 (1977) (Burger, C.J., dissenting), it is equally plain that a defendant must be allowed a fair opportunity to demonstrate that, in his individual case, society could be adequately protected by imposition of a life sentence rather than death.

officials who had had daily contact with petitioner for the nearly eight months prior to his trial, and a regular jail visitor who had met with him every week, might have gone far towards allaying such concerns. Accordingly, it is plain that the trial judge's exclusion of relevant and competent mitigating evidence created a situation in this case in which "the jury was told all the reasons why the death sentence should be imposed but only some of the reasons why it should not." Smith v. Estelle, 445 F. Supp. 647, 659 (N.D. Tex. 1978), aff'd on other grounds, 451 U.S. 454 (1981).

5. The need for review by this Court.

As noted earlier in this petition, the present case constitutes one of a lengthening series of capital decisions in which the South Carolina Supreme Court has developed and enforced a plainly erroneous restriction on the admission of relevant mitigating evidence. State v. Patterson, ___ S.C. ___, 327 S.E.2d 650 (1984), cert. denied, 53 U.S.L.W. 2726 (April 15, 1985), State v. Koon, Opinion No. 22075 (S.C., April 3, 1984), cert. denied, 53 U.S.L.W. 2726 (April 15, 1985), State v. Chaffee, Opinion No. 22182 (S.C., Nov. 13, 1984), cert. denied, 105 S.Ct 1878 (1985), State v. Elmore, Opinion No. 22322 (S.C., May 16, 1985). In addition, these cases demonstrate a mode of appellate review of Lockett violations which, if permitted to continue, will effectively vitiate the constitutional protection which Lockett and Eddings were intended to afford to capital defendants. South Carolina's firmly-established practice of affirming death sentences marred by plain Lockett error so long as some sort of general character evidence was admitted in mitigation also places the South Carolina Supreme Court in conflict with the state supreme courts of Georgia and Florida, which have implicitly acknowledged the impossibility of attempting to gauge the effect on a sentencing jury of erroneous exclusions of mitigating evidence. Cobb v. State, 244 Ga. 344, 260 S.E.2d 60, 69 (1979), Romine v. State, 251 Ga. 208, 305 S.E.2d 93, 100-102 (1983) Simmons v. State, 491 So.2d 316, 320 (Fla. 1982), Miller v. State, 332 So.2d 65

(Fla. 1976). For all of these reasons, the Court should grant the writ of certiorari to consider the constitutionality of South Carolina's restrictions on the scope of evidence admissible in mitigation in capital cases, as well as the application of the Chapman harmless constitutional error doctrine to violations of the Eighth Amendment principle of Lockett v. Ohio.

CONCLUSION

The writ should be granted.

Respectfully submitted,

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ATTORNEY FOR THE PETITIONER.

June 3, 1985.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-

RONALD DERAY SKIPPER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

A P P E N D I X

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Attorney at Law

1711 Pickens Street
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ATTORNEY FOR PETITIONER

The STATE, Respondent,

v.

Ronald DeRay SKIPPER, Appellant.

No. 22234.

Supreme Court of South Carolina.

Feb. 12, 1985.

Defendant was convicted in the General Sessions Court, Horry County, Marion H. Kinon, J., of murder and first-degree criminal sexual conduct and he appealed. The appeal was consolidated with mandatory review of the defendant's death sentence. The Supreme Court, Chandler, J., held that: (1) there was no systematic exclusion of jurors; (2) excusal for cause of two jurors was proper; (3) there was no improper ex parte communication when the trial judge requested legal authorities on points of law from the State's attorney; (4) the circumstances of a prior rape were admissible during the sentencing phase of the trial in reference to the characteristics of the defendant; (5) the solicitor's final argument during the sentencing phase was not an improper appeal to the passion and prejudice of the jury; (6) where the alleged statutory aggravating circumstance of rape was established in the guilt phase of the trial, the defendant was not prejudiced by the failure to give a limiting instruction that details of prior convictions could only be considered as evidence of his characteristics; and (7) the death sentence was not excessive or disproportionate.

Affirmed.

1. Jury ⇐33(1.2, 1.4)

Statute providing optional jury service to practicing physicians, lawyers, men and women over 65 and others did not systematically exclude or disqualify any category of citizens; rather, statute granted option which juror alone could exercise. Code 1976, § 14-7-850.

2. Jury ⇐40

Excusal for cause of juror who advised trial judge that she was nervous because of her awareness of defendant's prior convictions, whose mother advised judge of juror's serious medical problems, who appeared to be in somewhat of a stupor, whose speech was slurred and whose eyes fluttered and were closed during part of her testimony on voir dire was proper.

3. Jury ⇐108

Juror was properly excused for cause where she stated categorically that she could not vote to impose the death penalty, even though isolated portion of her testimony on voir dire indicated that she might agree to death penalty under certain circumstances.

4. Criminal Law ⇐867

Communication between trial judge and State's attorney during jury deliberations was not improper ex parte communication so as to entitle defendant to mistrial where there was no substantive discussion of defendant's trial, but rather, trial judge requested legal authorities on points of law.

5. Criminal Law ⇐986.6(3)

In sentencing phase of capital case, it is essential that jury have for consideration all pertinent information about defendant on trial for his life.

6. Homicide ⇐354

Evidence of nonstatutory aggravating circumstances is admissible in sentencing phase of capital murder trial.

7. Homicide ⇐354

In sentencing phase of prosecution for murder and first-degree criminal sexual conduct which resulted in death sentence, evidence of circumstances of prior rape of State's witness was admissible, but only with respect to characteristics of defendant.

8. Homicide ⇐354

In sentencing phase of prosecution for murder and first-degree criminal sexual conduct which resulted in death sentence,

trial judge properly refused to admit evidence of defendant's future adaptability to prison life.

9. Criminal Law ⇐699, 1154

Propriety of jury argument rests in sound discretion of trial judge and, absent abuse amounting to error of law, will not be disturbed.

10. Criminal Law ⇐723(1)

State's attorney's final argument during sentencing phase of prosecution for murder and first-degree criminal sexual conduct which resulted in death sentence did not amount to improper appeal to passion and prejudice.

11. Homicide ⇐341

Where [illegible]'s alleged statutory aggravating circumstance was established in guilt phase of capital murder prosecution by defendant's conviction of rape, no prejudice resulted to defendant from failure to give limiting charge to jury that details of prior conviction could be considered only as evidence of defendant's characteristics and not as proof of aggravating circumstance of rape.

12. Homicide ⇐311

Where defendant has not been convicted in guilt phase of capital murder prosecution of crime relied on by state as statutory aggravating circumstances, limiting instruction must be given that details of prior convictions could be considered only as evidence of his characteristics and not as proof of statutory aggravating circumstance.

13. Homicide ⇐354

Death sentence upon conviction for murder and first-degree criminal sexual conduct was not excessive or disproportionate to offenses. Code 1976, § 16-3-25(C)(3).

Richard G. Dusenbury, Florence, and South Carolina Office of Appellate Defense, Columbia, for appellant.

Atty. Gen. T. Travis Medlock, Asst. Attys. Gen. Harold M. Coombs, Jr., and Charles H. R[illegible]ardson, Columbia, and Sol. James O. Du[illegible], Conway, for respondent.

CHANDLER, Justice:

Appellant was convicted of murder and first degree criminal sexual conduct (rape), and sentenced to death and thirty years imprisonment.

We consolidate his appeal and our mandatory review of the death sentence, and affirm.

FACTS

On the evening of November 1, 1982, Maryanne Wray (victim) went with two friends to the Rainy Day Inn in Garden City. Around 11:00 p.m. she left with Appellant, telling her friends that they were going to the beach. Later her friends saw Appellant and the victim on the beach, embracing. When she did not return to the Inn, the friends left at 2:00 a.m.

The victim's body was found the next morning at a house near the Garden City pier; she had been strangled.

Appellant was arrested on November 2 and, on the basis of a photographic and live lineup, charged with the crimes.

ISSUES

Appellant contends numerous reversible errors were committed in the (I) jury selection, (II) guilt and (III) sentencing phases of his trial.

1. JURY SELECTION

First, Appellant contends the trial judge erred in refusing his motion to quash the jury venire. We disagree.

[1] Appellant argues that S.C.Code Ann. § 14-7-850 (1976 & Supp.1983), in providing optional jury service to practicing physicians, lawyers, men and women over 65 and others, systematically excludes certain categories. Specifically, he contends that input from physician-jurors would contribute to the solution of medical and scientific issues before the jury.

The exception is without merit. The statute does not exclude or disqualify any category of citizens. Rather, it grants an option which the juror alone may exercise. *State v. Graham*, 79 S.C. 116, 60 S.E. 131 (1908).

There was no systematic exclusion of jurors.

Next, Appellant contends the excusal for cause of two jurors was improper. We disagree.

[2] Juror Madelyn Jane Antil (Antil) was under voir dire examination when the Court recessed for lunch. During the lunch hour she went to the trial judge's chambers and advised him that she was nervous because of her awareness of Appellant's prior convictions. The judge then brought in Antil's mother who advised him of her daughter's serious medical problems.

After recess the judge announced his excusal of Antil for cause. When Appellant's counsel objected, the judge gave a detailed explanation for his ruling. He stated that, commencing on the previous day, he had observed Antil closely. She appeared to be in somewhat of a stupor, her speech was slurred, her eyes fluttered and were closed during part of her testimony. She was extremely nervous and had difficulty answering questions.

From these observations and what he had learned at chambers, the judge concluded Antil was not competent to serve and stated:

> I have a duty to this defendant to assure him of a fair and impartial jury. I feel it would be to the best interest of the defendant that this juror be excused.

The actions of the trial judge were both correct and proper. "It is the duty of the trial judge to assure himself that each and every prospective juror is unbiased, fair and impartial," *State v. Holland*, 261 S.C. 488, 495, 201 S.E.2d 118 (1973), and "[t]he method and scope of *voir dire* is within the trial court's discretion." *State v. Thompson*, 278 S.C. 1, 10, 292 S.E.2d 581 (1982), cert. den. 456 U.S. 938, 102 S.Ct. 1996, 72 L.Ed.2d 458.

[3] The second juror, Carolyn W. Livingston (Livingston), was excused by the Court on the ground of her opposition to the death penalty. Appellant contends her excusal was in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). We disagree.

Although in an isolated portion of her testimony she appeared to agree that under certain circumstances she could agree to the death penalty, Livingston stated categorically that she could not vote to impose the death penalty:

> Q. To boil it down to just one question. Based on your views of life, all that you feel, your upbringing and everything, could you really *in any case* sign your name on a piece of paper to put somebody in the electric chair? *Could you? Anybody?* (Emphasis supplied).
>
> A. No, I don't. No, because I don't want to live with it.

As in *State v. Plath*, 281 S.C. 1, 6, 313 S.E.2d 619 (1984), we find "[this response] fully warranted disqualification of the juror."

"The entire colloquy in voir dire, and not isolated portions, determines the qualifications of jurors to serve." *State v. Truesdale*, S.C., — S.E.2d — (1984).

II. GUILT PHASE

[4] Appellant contends that during jury deliberation of the guilt phase, an alleged ex parte communication between the trial judge and Brian Gibbes, a state's attorney, entitled Appellant to a mistrial. We disagree.

From the record it is clear that the incident complained of was not a communication within the definition and application of the term "ex parte."

According to the testimony, Mr. Gibbes, while at chambers and in the presence of the trial judge's law clerk, was requested by the judge to submit authority on a point

of law. At that moment Appellant's counsel, Mr. Dusenbury, entered. He contends Mr. Gibbes was pointing to underlying sections of some opinions which constituted an ex parte communication and grounds for mistrial.

The trial judge's explanation of what occurred is set forth in this colloquy:

> *The Court:* ... Mr. Dusenbury, what happened is, at the close of court on Friday he (Mr. Gibbes) came into chambers. I said, 'If you have any authority on that particular proposition, please submit it to me so I can study it.'
>
> Before I had a chance to send for you to ask likewise, you walked in and I told you if you had any authority to please present it in order to give me a chance to do some studying over the weekend, which I did. (Parenthesis supplied).

Appellant's contention that the alleged ex parte conference improperly influenced the trial judge's later ruling in the sentencing phase on admissibility of certain evidence is conjecture.

While ex parte communications are grossly improper and must be dealt with accordingly, there is no evidence here of any substantive discussion of Appellant's trial, only a request by the Court for legal authorities on points of law.

III. SENTENCING PHASE

First, Appellant contends error was committed in the admission of details of other crimes, and of evidence in aggravation not delineated in the death penalty statute. Specifically, he argues that details incident to Appellant's rape of State's witness, Sue Stuckey, were inadmissible. We disagree.

The initial disclosure of Appellant's rape of Stuckey occurred during his counsel's opening statement. As a trial strategy, counsel informed the jury that Appellant had been convicted of three sexual crimes, including the rape of Stuckey.

In the guilt phase Appellant conceded that conviction for rape of Stuckey was admissible under *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). His objection is confined to the details of her rape testified to by Stuckey in the sentencing phase.

[5] In the sentencing phase of a capital case it is essential that the jury have for consideration all pertinent information about the defendant on trial for his life. *Barefoot v. Estelle*, 463 U.S. 880, ——, 103 S.Ct. 3383, 3396, 77 L.Ed. 1090, 1107 (1983), cited in *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984).

"What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek v. Texas*, 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929, 941 (1976).

[6] Appellant's contention that, in the sentencing phase, evidence of non-statutory aggravating circumstances is inadmissible is refuted by numerous decisions of this Court, the United States Supreme Court and courts of other jurisdictions. *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Jurek v. Texas*, *supra*; *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979), cert. den. 444 U.S. 957, 100 S.Ct. 437, 62 L.Ed.2d 329; *State v. Koon*, 278 S.C. 528, 298 S.E.2d 769 (1982), app. after rem. Davis' Advance Sheets, Op. No. 22075, S.C., — S.E.2d ——, Filed April 3, 1984; *State v. Plath*, 277 S.C. 126, 284 S.E.2d 221 (1981), app. after rem. 281 S.C. 1, 313 S.E.2d 619 (1984); *Barfield v. Harris*, 719 F.2d 58 (4th Cir.1984).

[7] Here, the trial judge ruled that circumstances of prior offenses were admissible only in reference to characteristics of Appellant. Evidence of such circumstances was properly admitted.

Next, Appellant charges error in refusal of the trial judge to permit testimony of Appellant's adjustment to prison life. We disagree.

[8] The trial judge properly refused to admit evidence of Appellant's *future* adapt-

ability to prison life. *State v. Koon, supra.* However, evidence of his past adaptability was admitted through testimony of his former wife, his mother and his own testimony. This contention is without merit.

Appellant next contends that the Solicitor's final argument was an appeal to the passion and prejudice of the jury. We disagree.

[9] The propriety of jury argument rests in the sound discretion of the trial judge and, absent an abuse amounting to an error of law, will not be disturbed. *State v. Durden*, 264 S.C. 86, 212 S.E.2d 587 (1975); *State v. Pitts*, 256 S.C. 420, 182 S.E.2d 738 (1971).

[10] We find from a review of the record, that the portions of the Solicitor's argument complained of do not constitute error when applied to the decisions of our Court.

Finally, Appellant, citing *State v. Stewart*, S.C., 320 S.E.2d 447 (1984), contends the trial judge erred in failing to give a jury instruction that details of prior convictions could only be considered as evidence of his characteristics, and could not be used as proof of the statutory aggravating circumstance of rape. We disagree.

In *Stewart* we held under the facts of that case that such a limiting instruction must be given. However, our holding was not intended to require the instruction where, as here, the statutory aggravating circumstance relied upon by the State in the sentencing phase has been proven beyond a reasonable doubt in the guilt phase.

[11] This case is distinguishable from *Stewart*. The test to be applied is whether failure to give the charge is prejudicial to the defendant. Where, as here, the State's alleged statutory aggravating circumstance has been established in the guilt phase by Appellant's conviction of rape, no prejudice resulted to him from failure to give the limiting charge to the jury in the sentencing phase.

Indeed, in the sentencing phase the State introduced no evidence of the crime of rape additional to that in the guilt phase, relying wholly upon the Court's granting of its motion "to introduce into the punishment phase of this trial all evidence previously admitted into the guilt phase of the trial."

[12] Accordingly, we hold that where the defendant has not been convicted in the guilt phase of the crime relied upon by the State as the statutory aggravating circumstance, the limiting instruction must be given when the State introduces evidence of details of prior acts or crimes. In those cases the jury must be charged that such evidence can be considered only as to the defendant's characteristics, and not as proof of the alleged statutory aggravating circumstance.

Appellant's reliance upon *Stewart* is misplaced.

PROPORTIONALITY REVIEW

[13] Pursuant to § 16-3-25(C)(3), we have reviewed the other death penalty cases in this State on the question of proportionality. *State v. Shaw and Roach*, 273 S.C. 194, 255 S.E.2d 799 (1979).

We find the sentence is not excessive or disproportionate to that imposed in similar cases. The death penalty is fully justified by the evidence of this case.

AFFIRMED.

LITTLEJOHN, C.J., and NESS, GREGORY and HARWELL, JJ., concur.

The Supreme Court of South Carolina

CLYDE N. DAVIS, JR.
CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211

April 3, 1985

Richard G. Dusenbury, Esquire
P. O. Box 555
Florence, South Carolina 29501

Re: The State v. Ronald DeRay Skipper

Dear Mr. Dusenbury:

The Court has refused your Petition for Rehearing in the above case in the following Order:

"Petition Denied.

s/ Bruce Littlejohn	C.J.
s/ J. B. Ness	A.J.
s/ George T. Gregory, Jr.	A.J.
s/ David W. Harwell	A.J.
s/ A. Lee Chandler	A.J.

April 3, 1985."

This is to confirm your telephone conversation this date with Donna Johnson, of my staff, in which you advised that you would file a Petition for Stay of Execution in this office no later than Friday, April 5, 1985.

Sincerely yours,

CLERK

CND,Jr./drj

cc: The Honorable Charles H. Richardson
Assistant Attorney General
P. O. Box 11549
Columbia, South Carolina 29211

S. C. Office of Appellate Defense
1122 Lady Street, Suite 301
Columbia, South Carolina 29201

The Supreme Court of South Carolina

The State,

Respondent,

v.

Ronald DeRay Skipper,

Appellant.

O R D E R

Petition for Stay of Mandate Pending Certiorari filed in the above matter is granted for a period of sixty (60) days from the date of this Order pending filing of Petition for Writ of Certiorari in the United States Supreme Court.

IT IS SO ORDERED.

FOR THE COURT C.J.

Columbia, South Carolina

April 9, 1985

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. 84-6859

RONALD DERAY SKIPPER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June 1985, one copy of the Petitioner's Reply to Respondent's Brief in Opposition was mailed, postage prepaid, to the below named counsel for the Respondent. I further certify that all parties required to be served have been so served.

Harold M. Coombs, Jr., Esquire
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Sworn to and subscribed before
me this 17th day of June, 1985.

Catherine A. Gulley (L.S.)
Notary Public for South Carolina
My Commission Expires: 6/18/91.

EDITOR'S NOTE

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IN THE

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October Term, 1984

No. 84-6859

RONALD DERAY SKIPPER, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. TRAVIS MEDLOCK
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Post Office Box 11549
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ATTORNEYS FOR RESPONDENT.

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES THAT A TRUE COPY OF Brief in Opposition HAS BEEN SERVED UPON OPPOSING COUNSEL BY MAILING 1 COPIES IN AN ENVELOPE PROPERLY ADDRESSED WITH POSTAGE PREPAID THIS 14th DAY OF June, 1985.

Harold M. Coombs Jr.
ATTORNEY FOR Respondent.

SWORN TO BEFORE ME THIS 14th DAY OF June, 1985.

Karen B. Newton (L.S.)
Notary Public for South Carolina
My Commission Expires 9-17-86.

QUESTION PRESENTED

I.

Since the South Carolina Supreme Court applied the applicable law and afforded Petitioner the right to introduce relevant evidence in mitigation of the capital offense, is there now reason for the Court to issue the Writ of Certiorari?

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OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in State v. Skipper, ___ S.C. ___, 328 S.E.2d 58 (1985) and is reproduced in Petitioner's Appendix at pages A-1 - A-55.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

I.

Since the South Carolina Supreme Court applied the applicable law and afforded Petitioner the right to introduce relevant evidence in mitigation of the capital offense, is there now reason for the Court to issue the Writ of Certiorari?

ARGUMENT

I.

The South Carolina Supreme Court applied the correct law in affording Petitioner the right to introduce relevant

evidence in mitigation of the capital offense, and there is no reason for the Court to issue the Writ of Certiorari.

Petitioner asserts in essence that the present case is an appropriate occasion for the Court to expressly consider whether Lockett error may be harmless if it appears beyond a reasonable doubt that the error did not contribute to the verdict. (Pet., pp. 16-17). Petitioner then first suggests that "any attempt to identify whether constitutional error in the exclusion of relevant mitigating evidence from a capital sentencing proceeding may have contributed to the sentencing verdict is fraught with insurmountable difficulties" (Pet., p. 19, lines 3-7) but Petitioner must necessarily admit "where only genuinely cumulative testimony is excluded, the trial court has not committed any error at all. (Pet., p. 20, lines 8-10). Cumulative evidence is additional evidence of the same kind to the same point. State v. Funderburke, 251 S.C. 536, 164 S.E.2d 309 (1944). And the principle that exclusion of merely cumulative mitigating testimony may be found harmless is recognized by the South Carolina Supreme Court. State v. Plemmons, S.C. Supreme Court Op. No. 22338, June 3, 1985; State v. Elmore, S.C. Supreme Court Op. No. 22322, May 16, 1985; State v. Lucas, S.C. Supreme Court Op. No. 22224, January 29, 1985, cert. denied, U.S.S.Ct. June 10, 1985; State v. Koon, ___ S.C. ___, 328 S.E.2d 625 (1985), cert. denied, U.S.S.Ct. April 15, 1985. In light of the South Carolina Supreme Court's ruling in State v. Stewart, ___ S.C. ___, 320 S.E.2d 447 (1984) that the exclusion of relevant character evidence (testimony of jail and stockade officers concerning defendant's past behavior in prison) offered in mitigation is reversible error, Petitioner now asks the Court to grant

the Writ merely to challenge the determination by the South Carolina Supreme Court that Petitioner was duly afforded the opportunity to introduce evidence of his past adaptability to prison life by his own testimony and through the testimony of other witnesses.

Petitioner also argues that predictions of future adaptability to prison life should be admissible into evidence. This view is without merit. "A jury needs to know how a given defendant came to commit a given aggravated murder to include aspects of his background, his character and the setting of the crime itself which may explain or even mitigate the conduct of which he has been found guilty." State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627 (1984). A defendant's future adaptability or conformity to prison life is irrelevant. Id.; State v. Koon, 278 S.C. 528, 298 S.E.2d 769, 774 (1982); State v. Koon, ___ S.C. ___, 328 S.E.2d 625 (1985), cert. denied, U.S.S.Ct. April 15, 1985. Petitioner advances no convincing argument or authority as to why one's continuing enjoyment of life should be contingent upon his future adaptability to prison. Regardless of whether the future adjustment is good or poor the defendant would still be alive, and the continuance of his life in light of his commission of a particular crime is the question before the jury. The jury is simply not being called upon in a capital sentencing proceeding to choose an ordinary citizen who they feel will be a well-adjusted productive prisoner.

The Supreme Court of South Carolina has repeatedly asserted the right of the accused and State to present to the jury during the sentencing phase of a capital case relevant information concerning the person on trial for his life. "In the sentencing phase of a capital case it is

essential that the jury have for consideration all pertinent information about the defendant on trial for his life." State v. Skipper, ___ S.C. ___, 328 S.E.2d 58 (1985), citing, Barefoot v. Estelle, ___ U.S. ___, 103 S.Ct. 3383, 3396, 77 L.Ed.2d 1090, 1107 (1983); accord, State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627 (1984). "The United States Supreme Court held in Lockett v. Ohio, 438 U.S. 586, 604 (1978), 'the sentencer, in all but the rarest kind of capital case [should] not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." State v. Koon, ___ S.C. ___, 328 S.E.2d 625 (1985). This, of course, includes the testimony of jail and prison officials concerning a defendant's behavior since his arrest offered to show the defendant's character. State v. Plemmons, S.C. Supreme Court Op. No. 22338, June 3, 1985; Koon, 328 S.E.2d at 626; State v. Patterson, ___ S.C. ___, 327 S.E.2d 650 (1984); State v. Stewart, ___ S.C. ___, 320 S.E.2d 447 (1984). Any statutory or non-statutory mitigating circumstances may be considered by the jury in arriving at their sentence. State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), citing, Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). In State v. Koon, 278 S.C. 528, 298 S.E.2d 769, 774 (1982) the South Carolina Supreme Court stated:

> The jury is concerned with the circumstances of the crime and the characteristics of the individual defendant as they bear logical relevance to the crime. [citation omitted]. In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), cited as controlling in Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982),

> the United States Supreme Court retained the court's traditional authority to exclude irrelevant evidence which did not bear on a defendant's character, prior record, or the circumstances of his offense.

The traditional authority of the trial court to exercise its sound discretion in determining the relevancy and admissibility of proffered testimony is not superseded by the defendant's right to present evidence in mitigation relating to his character, record, and the circumstances of the offense. Shriner v. Wainwright, 715 F.2d 1452, 1456 (11th Cir. 1983) and Raulerson v. Wainwright, 732 F.2d 803, 806-808 and n. 6 (11th Cir. 1984), citing, Lockett v. Ohio, 438 U.S. 586 (1978).

It is inescapable that the South Carolina Supreme Court presently recognizes and applies the principles upon which Petitioner asks the Court to grant certiorari. In fact, Respondent again notes that the South Carolina Supreme Court has applied these principles and reversed the death sentence in State v. Stewart, ___ S.C. ___, 320 S.E.2d 447 (1984) where relevant mitigating evidence was excluded at trial.

Contrary to Petitioner's assignments of error, an examination of the case demonstrates the admission of testimony concerning both Petitioner's past and future good conduct as a prisoner.

1. Prior to asking his witness (Petitioner's former wife) about future adaptability to prison conditions and making his confusing offer of proof, Petitioner's counsel elicited, without objection, testimony that Petitioner has made a good adjustment to prison life. (App. p. 5, lines 1-4).

2. Petitioner's mother testified that Petitioner had been free of drugs since the date of his arrest. (App. p. 6, lines 23-25).

3. Petitioner testified that prison provided him with education in mechanics which complimented prior experience and training in the field and led him to set a lifetime career objective. (App. p. 1, lines 11-16).

4. Petitioner, a skilled mechanic, believed that he could work in prison at the minimum wage during the course of a life sentence and help his children get a good education. (App. p. 1, line 17-p. 2, line 17).

5. Petitioner, by his own testimony, has made a good adjustment to prison life and wants to do his time and get out of prison. Petitioner likes his jailers; the jailers are good to Petitioner, and Petitioner tries to be good to them. (App. p. 3, line 4-p. 4, line 9).

Since the record demonstrates that Petitioner was able to introduce testimony of past good behavior in prison and, additionally, predict his own future adaptability during a desired life sentence, there was no conceivable error, and the Record does not support Petitioner's assignments of error. The South Carolina Supreme Court applied the correct law to insure that Petitioner was afforded the opportunity to have all relevant evidence in mitigation considered by the jury during the sentencing phase of the capital case. There is no issue presented for the Court's consideration, and the Writ should be denied.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

HAROLD M. COOMBS, JR.
Assistant Attorney General

ATTORNEYS FOR RESPONDENT.

girls were.

THE COURT: I will permit that question.

A My understanding was they were sisters, and one was fifteen and the other sixteen.

Q You served how much time under the Youthful Offender Act?

A Thirteen months.

Q When you got out, what type work did you do?

A I went to work for Garland's Garage doing mechanic work, diesel and auto.

Q Where did you learn mechanic work?

A My father was a pretty good mechanic. I followed him around and picked it up there. When I went to prison, I went to school, ignitions, batteries, different things. When I got out, that's what I wanted to do all my life. I worked before I was incarcerated as a diesel mechanic trainee.

Q Are you skilled at diesel mechanic work?

A Yes sir.

Q If you receive a life sentence, what would you want to do with your employment skills?

MR. DUNN: Object. If he received a life sentence what he would want to do with his employment skills is not relevant.

THE COURT: I will permit the question.

A Well, like I say, I am a skilled mechanic. I would want

to work.

Q What would you want to do with the money? Why did you form this idea?

A My understanding from Chief Warren Baker (sic) of the South Carolina Supreme Court -- I mean United States Supreme Court, if I am not mistaken, is trying to work out some kind of job situation with people with long terms so they can earn minimum wage and support their family.

Q What would you want to do with the money you earned from this?

A I would like to help my children.

Q What specific ways?

A Like for instance a good education. If not an expensive college, at least technical college or something like Francis Marion or Coastal.

Q How many children do you have?

A I have three.

Q What are their ages, names and ages?

A I have Christopher Brian, he is eight: Amanda Lee, she is five; and Ronald Deray, II, he is two.

Q Where did you work after doing the mechanics work? What other forms of jobs did you have?

A You mean after incarceration?

Q Yes.

A I went to what they call Job Assessment, which is CETA

funds. I took up machine shop, tool and die, technology of tool and die. Later after I graduated the course I went to work for J. and H. Spiff Manufacturing in Lamarr.

Q. By the way, with reference to your adjustment to prison, when you were first incarcerated here in the Horry County jail, did you have any difficulties at first?

A. You always have difficulties when you first get locked up.

Q. Did you make any complaints right at the start?

A. Yes, sir, quite a few.

Q. What specifically did they involve?

A. Well, they locked me up on Saturday night. I was kicking the door because I wanted to make a phone call. I had some cigarettes and they wouldn't let me have them. I had some stuff, like a change of clothes, shampoo. They wouldn't let me have them.

Q. Did your wife come see you?

A. Yes, sir. They wouldn't let her see me. That was to my knowledge.

Q. After that initial period, what has been your adjustment?

A. I learned to live with it.

Q. How do you get along with the jailers?

A. I try to get along the best I can.

Q. What has been your experience with specific jailers?

A. I never had any trouble out of them. I mean everybody

had difficulties, but I like them. I get along with them. They are good to me. I try to be good to them.

Q If you received a life sentence and were in a prison population, what type adjustment do you feel you could make to a life sentence?

A I would want to do my time and get out.

Q When would you expect to get out?

A Twenty years is a life sentence for parole, but there is no guarantee for parole then.

Q After you had worked for a period as a mechanic, where else have you worked?

A I worked for Roper Lawnmower Products in Orangeburg.

Q Doing what?

A Machine shop work.

Q Let me ask you this, on those two offenses that the State has referred to, the one with Miss Norwood and the one in Georgetown County, was anybody ever hospitalized?

A Not to my knowledge, no, sir.

Q In Florence -- How did you meet the person or how did you get with the person in Florence that you were charged with criminal sexual conduct?

A I met her at a restaurant where my former wife was working.

Q Did you make any attempt to conceal your identity?

A No, sir.

Q I believe you all were together how long?

Q Now, since that period when you and Ronny were upset, I ask you whether or not what type of adjustment he made to prison life?

A He has made a good adjustment.

Q What is your opinion as to whether or not he could be---

MR. DUNN: Object to, "What is your opinion." It can't be relevant. She is not qualified as an expert of any kind.

THE COURT: Mr. Dusenbury?

MR. DUSENBURY: I think she is well qualified.

THE COURT: Let's hear the rest of your question and then I will decide.

Q What is your opinion from your knowledge of Ronny and his reaction to authority under the present conditions, and under prison conditions over an extended period of time: what is your opinion as to whether he could make a good adjustment?

THE COURT: Objection sustained.

MR. DUSENBURY: Your Honor, we would like to take up a matter of law outside the presence of the jury.

THE COURT: I refer you to the case of State versus Koon. I am familiar with the law. If you would like to put something on the record, you may do so at this time, or you may do so at the next recess.

MR. DUSENBURY: I would like to put it on the record at this time.

THE COURT: Ladies and gentlemen, I would ask you to

A. The two boys, because the girl that divorced him -- I don't know where she lives. I haven't seen the child so I don't know where she lives.

Q. What is his relationship and affectionate situation with regards to the two boys?

A. He would pick his oldest son up on the weekend, His youngest son, when he wasn't working, he would keep little Ronny. When Pam was working, she would keep little Ronny. Ronny had a good relationship with his children.

Q. Other than his father, what is his relationship with his relatives?

A. I never had any problems with Ronny and his relatives. As a matter of fact, Ronny and I never had any problems.

Q. What kind of worker is Ronny when he is not on drugs, and how does he feel about work?

A. Ronny can do a lot of things. Ronny was a carpenter with my father. Most of our nephews are carpenters. He is a carpenter. I sent him to tech. He is a mechanic. He is a diesel mechanic. He worked in tool and die. He went to school for tool and die. He helped my husband now.

Q. That's Mr. Robert Wall?

A. That's correct.

Q. Of course he is -- I will put it this way, is he clean now of drugs since he was arrested November 6, 1982?

A. Yes, sir.

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No. 84-6859

RONALD DERAY SKIPPER,

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STATE OF SOUTH CAROLINA,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEY FOR PETITIONER

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PETITIONER'S ARGUMENT IN REPLY
TO RESPONDENT'S BRIEF IN OPPOSITION

In his petition for a writ of certiorari, petitioner has cited a lengthening series of death penalty decisions by the South Carolina Supreme Court which demonstrate a serious and continuing disregard of this Court's decisions concerning the scope of mitigating evidence admissible in capital sentencing proceedings. State v. Koon, ___ S.C. ___, 328 S.E.2d 625 (1984), cert. denied, 105 S.Ct. 2056 (1985); State v. Patterson, ___ S.C. ___, 327 S.E.2d 650 (1984), cert. denied, 105 S.Ct. 2056 (1985); State v. Chaffee, ___ S.C. ___, 328 S.E.2d 464 (1984), cert. denied, 105 S.Ct. 1878 (1985); State v. Skipper, ___ S.C.___, 258 S.E.2d 58, cert. filed (U.S., June 3, 1985) (No. 84-6859); State v. Elmore, Opinion No. 22322 (S.C., May 16, 1985). Because the trial judge refused in this case to permit petitioner to present to the sentencing jury competent evidence concerning the likelihood that he would make a nonviolent and co-operative prisoner if sentenced to life imprisonment, respondent correctly recognizes that it must defend on its merits the South Carolina Supreme Court's view that a convicted murderer's likely future conduct in prison is irrelevant as a matter of law in the determination of

his sentence. The state's one-paragraph effort to present such a defense is significant, however, only for its failure to cite or acknowledge even a single capital decision of this Court. Instead, the state of South Carolina appears to rely on two South Carolina Supreme Court cases, State v. Koon, supra, and State v. Plath, 281 S.C. 1, 313 S.E.2d 619, cert. denied, 104 S.Ct. 3560 (1984), which embody precisely the constitutional error at issue in this case. Brief in Opposition at 3.[1]

Respondent's other line of defense is its insistence that the excluded testimony of three neutral witnesses--two of them law enforcement officials--was rendered "cumulative" by the fact that petitioner himself and members of his family were permitted to attempt to convince the jury that petitioner's jail record was good. The predicate for this assertion, as for the decision of the South Carolina Supreme Court affirming petitioner's death sentence, was that the excluded evidence was admissible only as evidence of petitioner's general character, and not as evidence tending to establish his future nondangerousness in a prison environment--a subject which both respondent and the South Carolina court continue to regard as irrelevant. See Patterson v. South Carolina, 105 S.Ct. 2056, 2059 n. 5 (1985) (Marshall, J., dissenting from denial of certiorari). Even accepting this clearly unconstitutional predicate, the assertion is without merit.[2] Indeed, not

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[1]It might also be observed that the state's position appears to be only that a jury need not consider mitigating evidence concerning a capital defendant's future conduct in prison. At petitioner's trial neither the state nor the trial judge saw anything irrelevant in the prosecution's assertions that petitioner had been badly-behaved while incarcerated in the county jail, that he had probably committed homosexual rapes while serving a previous prison term, and that he was likely to do so again unless sentenced to death. Tr. 1201-1202, 1213.

[2]Accepting respondent's definition of cumulative evidence as "additional evidence of the same kind to the same point," it can readily be seen that the excluded evidence was neither of the same kind nor to the same point as the testimony of petitioner and of his mother and ex-wife. The excluded testimony was different in kind because it was testimony of neutral witnesses who had actually observed petitioner in a jail setting over an extended period of time, rather than that of biased family members testifying on the basis of little or no firsthand knowledge of petitioner's actual conduct. And the evidence was to different point both because it was offered in part to establish petitioner's future nondangerousness

even the South Carolina Supreme Court itself labelled the excluded evidence here as "cumulative." Rather, it noted simply that "evidence of [petitioner's] past adaptability [to prison] was admitted through testimony of his former wife, his mother and his own testimony." State v. Skipper, ___ S.C. ___, 328 S.E.2d 58, 62 (1985). In an opinion filed on the same day as the petition for writ of certiorari in this case, the South Carolina Supreme Court has explained that it will affirm death sentences marred by the identical Lockett error as is involved here when the excluded testimony was cumulative or "when the appellant had ample opportunity to present nonstatutory mitigating circumstances." State v. Plemmons, Opinion No. 22338 (S.C., June 3, 1985). Thus even noncumulative, relevant and admissible mitigating evidence may, according the South Carolina Supreme Court, be erroneously excluded from capital sentencing proceedings without compromising the constitutionality of a death sentence, so long as some other nonstatutory mitigating evidence was admitted. Since the excluded evidence in this case was not "cumulative" in any normally accepted sense of that word, it would appear that the South Carolina Supreme Court's affirmance of petitioner's death sentence was based not on a finding of "cumulativeness," but rather on its recently-articulated principle of appellate review which holds that a death sentence may be carried out so long as the sentencing authority was permitted to consider some of the reasons why it should not be.

In defense of the South Carolina Supreme Court's rather freewheeling approach to appellate review of Lockett error, respondent stresses that in State v. Stewart, 283 S.C. 104, 321 S.E.2d 447 (1984) the South Carolina court did actually reverse a death sentence due to the erroneous exclusion of testimony concerning a capital defendant's good behavior in jail. What respondent fails to note is that the defendant in Stewart presented no other

---

in confinement--a subject which South Carolina regards as irrelevant--and because it also sought to establish petitioner's actual record of good behavior in jail through the objective testimony of jail officials, rather than his family's opinion of his subjective attitude toward confinement.

mitigating testimony whatsoever, thus precluding the South Carolina Supreme Court's usual determination on appeal that a "sufficient" amount of mitigating evidence had been considered by the sentencing jury. State v. Elmore, Opinion No. 22322 (S.C., May 16, 1985), cf. State v. Plemmons, supra, State v. Patterson, ___ S.C. ___, 327 S.E.2d 650 (1984), cert. denied, ___ U.S. ___, 105 S.Ct. 2056 (1985). Indeed, the result in Stewart only serves to illustrate the arbitrary and paradoxical nature of South Carolina's method of appellate review of Lockett claims. In Stewart, the defendant had been convicted of an exceptionally brutal murder of an elderly widow committed in the course of burglary, sexual assault, and robbery. In aggravation, the prosecution proved that Stewart had committed three similar break-ins and violent assaults on three other elderly ladies both before and after the murder, and that he also had an extensive record of prior criminal convictions including a violent robbery attempt against an elderly woman, larceny, and escape from prison. Other than his jail record which was erroneously excluded, Stewart offered no evidence whatsoever in mitigation of his punishment. On these facts, without any consideration of the weight of the evidence as a whole, the South Carolina Supreme Court held that the exclusion of the jail record was reversible error. State v. Stewart, supra. However, in every other case where the South Carolina Supreme Court has found a Lockett violation to have occurred, some mitigating evidence was considered by the jury, and in every such case the South Carolina court has cited the existence of this evidence as its reason for declining to reverse the death sentence. State v. Plemmons, Opinion No. 22338 (S.C., June 3, 1985), State v. Elmore, supra, State v. Patterson, supra, State v. Skipper, supra. Since the South Carolina Supreme Court has by its own account chosen to focus solely on whether other mitigating testimony was considered by the sentencer in order to determine whether Lockett error requires reversal, State v. Elmore, supra, the effect of South Carolina's mode of appellate review has been

to grant relief in precisely those situations (of which Stewart is the only example to date) in which the error is least likely to have affected the outcome. At the same time, by affirming death sentences infected by Lockett error because of the presence of substantial other mitigating evidence, the South Carolina court has apparently failed to recognize that the existence of this other mitigating evidence may well have rendered the sentencing jury's decision a close one, and might thus have rendered the Lockett error especially important to the outcome.

The irrationality of this mode of appellate review is compounded by the South Carolina Supreme Court's failure to include in its harmless-error calculus any recognition of the weight of the evidence in aggravation of punishment. Cf. Connecticut v. Johnson, 460 U.S. 73, 95 (1983) (Powell, J. dissenting) ("it is only by assessing the weight of the evidence against the defendant that the effect of the error can be judged"). Thus in Stewart the state court reversed a death sentence imposed for an exceptionally brutal murder committed by a defendant with a lengthy record of similar violent crimes. In State v. Patterson, supra, by contrast, it found Lockett error to be harmless where the defendant's crime was unpremeditated and impulsive, where the victim died almost instantaneously, and where the defendant had no prior record of violence. The present case provides another example of the capriciousness of South Carolina's mode of Lockett review. Here the state's evidence showed that the victim voluntarily accompanied the defendant to a secluded area, and was seen embracing and kissing him shortly before her death. No weapon was employed, and the victim suffered no aggravated battery in excess of that required to effect the rape and murder. The evidence of rape--the sole statutory aggravating circumstance--was entirely circumstantial and was rather weak. Indeed, the state's entire case against petitioner was circumstantial, a fact which may in and of itself have militated against imposition of the death penalty. In mitigation, petitioner introduced extensive testimony concerning

his traumatic and violent childhood, cf. Eddings v. Oklahoma, 455 U.S. 104 (1982), as well as evidence of the effect of alcohol and drug addition, and his efforts to seek professional help for these problems prior to the murder. All of these circumstances are plainly reasons to doubt that the erroneous exclusion of relevant mitigating evidence can now be determined to have been harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). But under South Carolina's mode of appellate review explicated in State v. Elmore, Opinion No. 22322 (S.C., May 16, 1985) and applied in this case, the South Carolina Supreme Court treated the circumstances of the crime as irrelevant to its harmless-error analysis, and the existence of substantial mitigating circumstances as a reason to uphold the death sentence rather than to reverse it.

Petitioner recognizes that under normal circumstances, "harmless error 'is a question more appropriately left to the courts below." Francis v. Franklin, 105 S.Ct. 1965, 1977 n. 10 (1985) (quoting Connecticut v. Johnson, supra, 460 U.S. at 102 (Powell, J., dissenting)). However, the method of appellate review by which state courts undertake constitutional harmless-error analysis is itself a federal constitutional issue, Chapman v. California, supra, and will often prove crucial to the effective enforcement of constitutional guarantees. For the reasons set forth above and in his petition for writ of certiorari, petitioner submits that his case presents a situation in which the both the South Carolina Supreme Court's firmly-entrenched misreading of Lockett v. Ohio and its persistent failure to apply federal constitutional principles of harmless-error analysis to death penalty sentencing proceedings call for review and correction by this Court.

CONCLUSION

The writ should be granted.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

June 17, 1985

Supreme Court, U.S.
FILED
NOV 8 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-6859

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RONALD DERAY SKIPPER,
Petitioner,

v.

STATE OF SOUTH CAROLINA,
Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 3, 1985
CERTIORARI GRANTED OCTOBER 15, 1985

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CHRONOLOGY OF RELEVANT EVENTS

November 6, 1982:	Petitioner served with arrest warrant, taken into custody.
January 13, 1983:	Petitioner indicted for murder and criminal sexual conduct in the first degree.
June 20, 1983:	Commencement of petitioner's trial in Horry County Court of General Sessions.
June 24, 1983:	Petitioner convicted as charged.
June 27, 1983:	Beginning of sentencing hearing before trial jury.
June 28, 1983:	Jury recommends death sentence; petitioner sentenced to death.
July 15, 1983:	Trial judge files Death Penalty Sentencing Report with South Carolina Supreme Court.
February 12, 1985:	Conviction and sentence of death affirmed by South Carolina Supreme Court, *State* v. *Skipper*, ___ S.C. ____, 328 S.E.2d 58 (1985).
April 3, 1985:	Timely petition for rehearing denied without opinion by South Carolina Supreme Court.

April 6, 1985:	Stay of execution of sentence of death granted by South Carolina Supreme Court, pending filing and disposition of petition for writ of certiorari in the United States Supreme Court.
June 3, 1985:	Petition for writ of certiorari and motion for leave to proceed *in forma pauperis* filed in the United States Supreme Court.
October 15, 1985:	Motion for leave to proceed *in forma pauperis* and writ of certiorari granted, limited to Question I presented by the petition.

State v. Ronald DeRay Skipper, Sentencing Proceeding, Horry County Court of General Sessions, June 27, 1983.

[Tr. 1000]

* * * *

THE COURT: Yes, sir. At this time I need to determine from you, Mr. Dusenbury, each statutory mitigating circumstance which you contend is involved.

MR. DUSENBURY: Statutory circumstance 16-3-20 (B)(3).

THE COURT: Give me that again?

MR. DUSENBURY: 16-3-30 (D)(3).

THE COURT: Do you have any others.

MR. DUSENBURY: We are going to—The general mitigating circumstances, of course, will be the biographical life of the defendant, his ability to be rehabilitated. In that regard we have subpoenaed two jail guards, and Mrs. Carolyn Henry who is a visitor in the jail on a regular basis, and has conferred with the defendant once a week since his confinement. Although the State—The Supreme Court in Truesdale and I believe Koon, which I believe you Honor is familiar with, states these—Truesdale admonished counsel not for defendant to offer such testimony because of the ability of the defendant to adjust to a life sentence or to extended confinement in custody, and the testimony of jailers on that point, Miss Carolyn Henry, was not relevant. The **[Tr. 1001]** Court stating that only the conduct of the defendant or the testimony relating to mitigating circumstances of the crime itself. We think—

THE COURT: If it goes to characteristics, it would be admissible. I will rule on that at the proper time, if there is any question.

* * * *

(The following took place within the presence of the jury.)

RONALD DERAY SKIPPER, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. DUSENBURY:

* * * *

[Tr. 1032] Q. Did you ever get a GED?

A. Yes, sir.

Q. When did you get that?

A. When I was incarcerated.

Q. Was this on the statutory charges?

A. Yes, sir.

Q. By the way, what were you sentenced on at that time? What was your age when that offense was committed?

A. Sentence not to exceed six years, YOA.

Q. YOA is what?

* * * *

What he would want to do with his employment skills is not relevant.

THE COURT: I will permit the question.

A. Well, like I say, I am a skilled mechanic. I would want [Tr. 1034] to work.

Q. What you want to do with the money? Why did you form this idea?

A. My understanding from Chief Warren Baker [sic] of the South Carolina Supreme Court—I mean United States Supreme Court, if I am not mistaken, is trying to work out some kind of job situation with people with long terms so they can earn minimum wage and support their family.

Q. What would you want to do with the money you earned from this?

A. I would like to help my children.

Q. What specific ways?

A. Like for instance a good education. If not an expensive college, at least technical college or something like Francis Marion or Coastal.

Q. How many children do you have?

A. I have three

* * * *

[Tr. 1035] Q. By the way, with reference to your adjustment to prison when you were first incarcerated here in the Horry County jail, did you have any difficulties at first?

A. You always have difficulties when you first get locked up.

Q. Did you make any complaints right at the start?

A. Yes, sir, quite a few.

Q. What specifically did they involve?

A. Well, they locked me up on Saturday night. I was kicking the door because I wanted to make a phone call. I had some cigarettes and they wouldn't let me have them. I had some stuff like a change of clothes, shampoo. They wouldn't let me have them.

Q. Did your wife come see you?

A. Yes, sir. They wouldn't let her see me. That was to my knowledge.

Q. After that initial period, what has been your adjustment?

A. I learned to live with it.

Q. How do you get along with the jailers?

A. I try to get along the best I can.

Q. What has been your experience with specific jailers?

A. I never had any trouble out of them. I mean everybody [**Tr. 1036**] had difficulties, but I like them. I get along with them. They are good to me. I try to be good to them.

Q. If you received a life sentence and were in a prison population, what type adjustment do you feel you could make to a life sentence?

A. I would want to do my time and get out.

Q. When would you expect to get out?

A. Twenty years is a life sentence for parole, but there is no guarantee for parole then.

* * * *

[**Tr. 1040**] Q. I believe the testimony has been you were arrested on November 6, 1982?

A. Yes, sir, I believe it was.

Q. Have you been continuously in jail since then?

A. I have been in jail ever since then.

Q. Do you have any dependence now on any type drug or alcohol?

A. No. sir.

CROSS EXAMINATION OF RONALD DERAY SKIPPER BY MR. DUNN

* * * *

[Tr. 1065] Q. You are strong enough to grab somebody around the neck and choke the life out of them, aren't you?

A. I reckon I am.

Q. And bust the bone in the neck, you are strong enough to do that, aren't you?

A. I don't know, sir.

Q. You are the fellow that when you got to the Horry County jail went to kicking the cell, right?

A. Yes, Sir.

[Tr. 1066] Q. That's you. that's the kind of fellow you are, but you are nice today, right?

A. (No response.)

MR. DUNN: I have no further questions.

MR. DUSENBURY: Come down, Mr. Skipper.

* * * *

(The following took place within the presence of the jury.)

PAMELA ANDERSON SKIPPER, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. DUSENBURY:

* * * *

[Tr. 1071] Q. How long ago did you first meet Ronny Skipper?

A. September will make it three years ago.

Q. After you all met, how steady did you go together before you were married?

A. It was constantly from the first day we met.

* * * *

[Tr. 1072] Q. What problems developed, if any? Did any problems develop?

A. Well, when we first started dating—Well, like I said, we were constantly together. Ronny was having a lot of trouble sleeping at night. He would wake up and he would be crying and saying, "No, no, please don't," and all this type thing. I tried to ask him, you know, what was wrong. It was a couple of months before he would actually tell me what it was. I guess he didn't feel like at first he could really confide in me what was bothering him. One night after that, after he had been constantly crying out in his sleep and all this, I got him calmed down, and I asked him what was wrong.

MR. DUNN: Object to any conversation between this lady and the defendant.

THE COURT: That would be admissible.

Q. Go ahead.

A. Anyway, he told me from the beginning that he had been in prison at one time and told me the circumstances it [Tr. 1073] was for. I told him it made no difference to me. People make mistakes, whatever. He told me he had been raped while he was in prison, and that he felt some type guilt in himself because of what had happened. He didn't really tell me any details. He said it had happened with several men. Like I said, he really felt bad about it.

Q. Where did he say it happened?

A. When he was in prison. I'm not sure. I know he was at McDougal once and in Columbia once.

Q. What part of the prison area?

A. In the laundry area.

Q. What did he say this had done to his—You said it gave him a guilt feeling?

A. Yes, sir. He advised me if I felt like it made me feel any difference toward him for me to go my own way, you know, because he really felt bad about it. I asked him did he tell anybody at the prison. He said it would have done no good. I asked him if he had talked to somebody for some type of counseling or anything. He said he didn't really know what to do about it. I really didn't know what to do about it.

* * * *

[Tr. 1095] Q. Have you had occasion since he has been arrested to visit him on a regular basis?

A. I came down the day after he was arrested, after the family came and told me about it. They wouldn't let me see him. They wouldn't let him have any of the things I left for him.

Q. Let me ask you this. Did that upset him and all?

A. Yes, sir, it did. It upset us both.

Q. How long was it before they lifted that?

A. I'm not quite sure they did. I came down not the following weekend, but the next weekend and they still wouldn't let me see him. Nobody would tell me where he was. Nobody would tell me who I should contact that could tell me where he was. I said, "When can I see him?"

They said, "We don't know."

I said, "Who can tell me?"

"We don't know.

I said, "Well, somebody has to know." They wouldn't tell me anything.

[Tr. 1096] Q. Now, since that period when you and Ronny were upset, I ask you whether or not what type of adjustment he made to prison life?

A. He has made a good adjustment.

Q. What is your opinion as to whether or not he could be—

MR. DUNN: Object to, "What is your opinion." It can't be relevant. She is not qualified as an expert of any kind.

THE COURT: Mr. Dusenbury?

MR. DUSENBURY: I think she is well qualified.

THE COURT: Let's hear the rest of your question and then I will decide.

Q. What is your opinion from your knowledge of Ronny and his reaction to authority under the present conditions, and under prison conditions over an extended period of time; what is your opinion as to whether he could make a good adjustment?

THE COURT: Objection sustained.

MR. DUSENBURY: Your Honor, we would like to take up a matter of law outside the presence of the jury.

THE COURT: I refer you to the case of State versus Koon. I am familiar with the law. If you would like to put something on the record, you may do so at this time, or you may do so at the next recess.

MR. DUSENBURY: I would like to put it on the record at this time.

THE COURT: Ladies and gentlemen, I would ask you to [Tr. 1097] please go to the jury room.

(The following took place outside the presence of the jury.)

THE COURT: In the case of State versus Koon it says, "Appellate next alleges that the trial Court erred by excluding certain psychiatric evidence concerning his future adoptability to jail. We disagree. The penalty phase of a capital murder case is concerned with the existence of nonexistence of mitigating or aggravating circumstances involved in or arising out of the murder, not the convicted murderer's adoptability to prison life."

MR. DUSENBURY: Your Honor, we have under subpoena two jailers, Mr. Fritz Collins, Mr. Ronny Johnson, and a regular visitor Carolyn Henry to testify that the defendant has made a good adjustment.

THE COURT: Whether he can or cannot, State versus Koon says it is not an issue in this case.

MR. DUSENBURY: Even if they state after this initial period he has made a good adjustment?

THE COURT: Read State versus Koon. That is not an issue, whether he can adjust or not adjust.

MR. DUSENBURY: So none of these witnesses will be permitted to testify?

THE COURT: I don't know what they are going to say, but I am telling you they will not be permitted to testify [Tr 1098] about his adjustability to prison life.

MR. DUSENBURY: That is the only thing we would offer them for. Thank you, your Honor.

THE COURT: Anything further?

MR. DUSENBURY: No, sir.

* * * *

[Tr. 1118] (In the presence of the jury:)

HAZEL F. OLIVER,

being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. DUSENBURY:

* * * *

[Tr. 1119] Q. With regard to Ronny as a child; what was your relationship with him in his early childhood? What was your observation of him.?

A. Ronny was a real sweet child. He had always been. He had been real nice to me. Any time I needed something done, if he was around he would work on my car. If I needed to have someone go with me to hang my draperies, he would say, "Mama, I'll go with you. Just let me know." He was always real helpful. He was a real sweet child and a kind child.

Q. What about his work? Did you have occasion to observe his commitment to his work or his willingness to work?

A. He always worked when a job was available. My husband was a contractor. Of course I had Hazel's Interiors. We do try to keep the family working. When they didn't have jobs other places, we always made a job for them.

Q. What is your observation of Ronny's relationship with [Tr. 1120] his relatives, with your kin and his kin?

A. We always got along. We never had no problems with Ronny, not family.

Q. What about his relationship with his friends, did you have any occasion to observe that?

A. Well, Ronny had a lot of friends. They weren't just a friend today and gone tomorrow. They always hung around from friends he went to school with. In fact they still call and ask about him.

Q. Did you ever understand the reason why Ronny ran away twice when he was fifteen and sixteen?

A. Not really I didn't, but I knew something had to be wrong. He couldn't have been happy at home.

MR. DUSENBURY: Your Honor, I believe you previously ruled on adjustment?

THE COURT: Yes, sir.

MR. DUSENBURY: Answer any questions the Solicitor has.

MR. DUNN: I don't have any questions, ma'am.

* * * *

June 28, 1983. Continuation of sentencing proceedings, *State v. Skipper*. Jury argument for the state by Solicitor Dunn:

* * * *

[Tr. 1201] You know what he is. By your verdict he is a convicted murderer. A convicted murderer. By his record what is he? He is a four time loser. Four times. You heard the old saying three times and you are out in baseball. He is a four time loser. I will go into that in a little more detail.

What kind of fellow is he? He told you, not me, something about an unlawful weapon. He was the lookout man in a stealing case when he was very young. Been in

trouble all his life in some way or other. His wife said he told her—I didn't hear anybody else say it. He told her—Talking [Tr. 1202] about his wife, remember the marriage license where he was going to marry this other girl. He got that downstairs in the Probate Court. Anyway he said, he told her, that he had been raped in prison. With his history and what you know about him, who do you think the raper was and who do you think the rapee was? And if given the opportunity again with this four time sexual abusing loser, who do you think will get raped in prison? Will it be Ronald Skipper, big old robust Ronald Skipper who knocks woman in the side of the head, or will it be some little boy in prison?

* * * *

[Tr. 1209] These are the mitigating circumstances submitted by the defendant. One is statutory in the law that you are to consider. The others are mitigating circumstances that if they are supported by the evidence that you may wish to consider.

* * * *

[Tr. 1213] That the defendant has shown significant and positive adjustments to confinement and education and employment skills that enable him to be a stable and productive prisoner. Didn't he admit kicking on the bars over there? That's the kind of prisoner he is. Kicking on the bar. Kicking on the bars. He is the kind of prisoner he says got raped. Isn't it interesting, he says he got raped in prison, but what was he up there for when says he got raped? Criminal sexual conduct on a thirteen year old girl. I submit to you that is a figment of either his or his wife's imagination. Be that as it may.

* * * *

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ... *Respondent,*

v.

Ronald DeRay Skipper, ... *Appellant.*

Appeal From Horry County
Marion H. Kinon, Circuit Judge

Opinion No. 22234
Heard November 12, 1984—Filed February 12, 1985

AFFIRMED

Richard G. Dusenbury, of Florence, and South Carolina Office of Appellate Defense, of Columbia, for Appellant.

Attorney General T. Travis Medlock, Assistant Attorneys General Harold M. Coombs, Jr., and Charles H. Richardson, all of Columbia; and Solicitor James O. Dunn, of Conway, for Respondent.

CHANDLER, A.J.: Appellant was convicted of murder and first degree criminal sexual conduct (rape), and sentenced to death and thirty years imprisonment.

We consolidate his appeal and our mandatory review of the death sentence, and affirm.

FACTS

On the evening of November 1, 1982, Maryanne Wray (victim) went with two friends to the Rainy Day Inn in Garden City. Around 11:00 p.m. she left with Appellant,

telling her friends that they were going to the beach. Later her friends saw Appellant and the victim on the beach, embracing. When she did not return to the Inn, the friends left at 2:00 a.m.

The victim's body was found the next morning at a house near the Garden City pier; she had been strangled.

Appellant was arrested on November 2 and, on the basis of a photographic and live lineup, charged with the crimes.

ISSUES

Appellant contends numerous reversible errors were committed in the (I) jury selection, (II) guilt and (III) sentencing phases of his trial.

I. JURY SELECTION

First, Appellant contends the trial judge erred in refusing his motion to quash the jury venire. We disagree.

Appellant argues that S.C. Code Ann. § 14-7-850 (1976 & Supp. 1983), in providing optional jury service to practicing physicians, lawyers, men and women over 65 and others, systematically excludes certain categories. Specifically, he contends that input from physician-jurors would contribute to the solution of medical and scientific issues before the jury.

The exception is without merit. The statute does not exclude or disqualify any category of citizens. Rather, it grants an option which the juror alone may exercise. *State* v. *Graham*, 79 S.C. 116, 60 S.E. 131 (1908).

There was no systematic exclusion of jurors.

Next, Appellant contends the excusal for cause of two jurors was improper. We disagree.

Juror Madelyn Jane Antil (Antil) was under voir dire examination when the Court recessed for lunch. During the lunch hour she went to the trial judge's chambers and advised him that she was nervous because of her awareness of Appellant's prior convictions. The judge then brought in Antil's mother who advised him of her daughter's serious medical problems.

After recess the judge announced his excusal of Antil for cause. When Appellant's counsel objected, the judge gave a detailed explanation for his ruling. He stated that, commencing on the previous day, he had observed Antil closely. She appeared to be in somewhat of a stupor, her speech was slurred, her eyes fluttered and were closed during part of her testimony. She was extremely nervous and had difficulty answering questions.

From these observations and what he had learned at chambers, the judge concluded Antil was not competent to serve and stated:

> I have a duty to this defendant to assure him of a fair and impartial jury. I feel it would be to the best interest of the defendant that this juror be excused.

The actions of the trial judge were both correct and proper. "It is the duty of the trial judge to assure himself that each and every prospective juror is unbiased, fair and impartial," *State* v. *Holland*, 261 S.C. 488, 495, 201 S.E.2d 118 (1973), and "[t]he method and scope of *voir dire* is within the trial court's discretion." *State* v. *Thompson*, 278 S.C. 1, 10, 292 S.E.2d 581 (1982), cert. den. 456 U.S. 938, 102 S.Ct. 1996, 72 L.Ed.2d 458.

The second juror, Carolyn W. Livingston (Livingston), was excused by the Court on the ground of her opposition to the death penalty. Appellant contends her excusal was in violation of *Witherspoon* v. *Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.776 (1968). We disagree.

Although in an isolated portion of her testimony she appeared to agree that under certain circumstances she could agree to the death penalty, Livingston stated categorically that she could not vote to impose the death penalty:

> Q. To boil it down to just one question. Based on your views of life, all that you feel, your upbringing and everything, could you really *in any case* sign your name on a piece of paper to put somebody in the electric chair? *Could you? Anybody?* (Emphasis supplied).
>
> A. No, I don't. No. Because I don't want to live with it.

As in *State* v. *Plath*, 281 S.C. 1, 6, 313 S.E.2d 619 (1984), we find "[this response] fully warranted disqualification of the juror."

"The entire colloquy in voir dire, and not isolated portions, determines the qualifications of jurors to serve." *State* v. *Truesdale*, Davis' Advance Sheets, Op. No. 22176, filed October 31, 1984.

II. GUILT PHASE

Appellant contends that during jury deliveration of the guilt phase, an alleged ex parte communication between the trial judge and Brian Gibbes, a state's attorney, entitled Appellant to a mistrial. We disagree.

From the record it is clear that the incident complained of was not a communication within the definition and application of the term "ex parte."

According to the testimony, Mr. Gibbes, while at chambers and in the presence of the trial judge's law clerk, was requested by the judge to submit authority on a point of law. At that moment Appellant's counsel, Mr. Dusenbury, entered. He contends Mr. Gibbes was pointing to

underlying sections of some opinions which constituted an ex parte communication and grounds for mistrial.

The trial judge's explanation of what occurred is set forth in this colloquy:

> *The Court:* . . . Mr. Dusenbury, what happened is, at the close of court on Friday he (Mr. Gibbes) came into chambers. I said, 'If you have any authority on that particular proposition, please submit it to me so I can study it.'
>
> Before I had a chance to send for you to ask likewise, you walked in and I told you if you had any authority to please present it in order to give me a chance to do some studying over the weekend, which I did. (Parenthesis supplied).

Appellant's contention that the alleged ex parte conference improperly influenced the trial judge's later ruling in the sentencing phase on admissibility of certain evidence is conjecture.

While ex parte communications are grossly improper and must be dealt with accordingly, there is no evidence here of any substantive discussion of Appellant's trial, only a request by the Court for legal authorities on points of law.

III. SENTENCING PHASE

First, Appellant contends error was committed in the admission of details of other crimes, and of evidence in aggravation not delineated in the death penalty statute. Specifically, he argues that details incident to Appellant's rape of State's witness, Sue Stuckey, were inadmissible. We disagree.

The initial disclosure of Appellant's rape of Stuckey occurred during his counsel's opening statement. As a trial strategy, counsel informed the jury that Appellant had been convicted of three sexual crimes, including the rape of Stuckey.

In the guilt phase Appellant conceded that conviction for rape of Stuckey was admissible under *State* v. *Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). His objection is confined to the details of her rape testified to by Stuckey in the sentencing phase.

In the sentencing phase of a capital case it is essential that the jury have for consideration all pertinent information about the defendant on trial for his life. *Barefoot* v. *Estelle*, ____ U.S. ____, 103 S.Ct. 3383, 3396, 77 L.Ed. 1090, 1107 (1983), cited in *State* v. *Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984).

"What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek* v. *Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929, 941 (1976).

Appellant's contention that, in the sentencing phase, evidence of non-statutory aggravating circumstances is inadmissible is refuted by numerous decisions of this Court, the United States Supreme Court and courts of other jurisdictions. *Barclay* v. *Florida*, ____ U.S. ____, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); *Gregg* v. *Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Jurek* v. *Texas*, *supra*; *State* v. *Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979), cert. den. 444 U.S. 957, 100 S.Ct. 437, 62 L.Ed.2d 329; *State* v. *Koon*, 278 S.C. 528, 298 S.E.2d 769 (1982), app. after rem. Davis' Advance Sheets, Op. No. 22075, Filed April 3, 1984; *State* v. *Plath*, 277 S.C. 126, 284 S.E.2d 221 (1981), app. after rem. 281 S.C. 1, 313

S.E.2d 619 (1984); *Barfield* v. *Harris*, 719 F.2d 962 (4th Cir. 1984).

Here, the trial judge ruled that circumstances of prior offenses were admissible only in reference to characteristics of Appellant. Evidence of such circumstances was properly admitted.

Next, Appellant charges error in refusal of the trial judge to permit testimony of Appellant's adjustment to prison life. We disagree.

The trial judge properly refused to admit evidence of Appellant's *future* adaptability to prison life. *State* v. *Koon*, *supra*. However, evidence of his past adaptability was admitted through testimony of his former wife, his mother and his own testimony. This contention is without merit.

Appellant next contends that the Solicitor's final argument was an appeal to the passion and prejudice of the jury. We disagree.

The propriety of jury argument rests in the sound discretion of the trial judge and, absent an abuse amounting to an error of law, will not be disturbed. *State* v. *Durden*, 264 S.C. 86, 212 S.E.2d 587 (1974); *State* v. *Pitts*, 256 S.C. 420; 182 S.E.2d 138 (1971).

We find from a review of the record, that the portions of the Solicitor's argument complained of do not constitute error when applied to the decisions of our Court.

Finally, Appellant, citing *State* v. *Stewart*, ____ S.C. ____, 320 S.E.2d 447 (1984), contends the trial judge erred in failing to give a jury instruction that details of prior convictions could only be considered as evidence of his characteristics, and could not be used as proof of the statutory aggravating circumstance of rape. We disagree.

In *Stewart* we held under the facts of that case that such a limiting instruction must be given. However, our holding was not intended to require the instruction where, as here, the statutory aggravating circumstance relied upon by the State in the sentencing phase has been proven beyond a reasonable doubt in the guilt phase.

This case is distinguishable from *Stewart*. The test to be applied is whether failure to give the charge is prejudicial to the defendant. Where, as here, the State's alleged statutory aggravating circumstance has been established in the guilt phase by Appellant's conviction of rape, no prejudice resulted to him from failure to give the limiting charge to the jury in the sentencing phase.

Indeed, in the sentencing phase of the State introduced no evidence of the crime of rape additional to that in the guilt phase, relying wholly upon the Court's granting of its motion "to introduce into the punishment phase of this trial all evidence previously admitted into the guilt phase of the trial."

Accordingly, we hold that where the defendant has not been convicted in the guilt phase of the crime relied upon by the State as the statutory aggravating circumstance, the limiting instruction must be given when the State introduces evidence of details of prior acts or crimes. In those cases the jury must be charged that such evidence can be considered only as to the defendant's characteristics, and not as proof of the alleged statutory aggravating circumstance.

Appellant's reliance upon *Stewart* is misplaced.

PROPORTIONALITY REVIEW

Pursuant to § 16-3-25(C)(3), we have reviewed the other death penalty cases in this State on the question of

proportionality. *State* v. *Shaw and Veach*, 273 S.C. 194, 255 S.E.2d 799 (1979).

We find the sentence is not excessive or disproportionate to that imposed in similar cases. The death penalty is fully justified by the evidence of this case.

AFFIRMED.

LITTLEJOHN, C.J., NESS, GREGORY and HARWELL, JJ., concur.

THE SUPREME COURT OF SOUTH CAROLINA

RICHARD G. DUSENBURY, Esquire
P.O. Box 555
Florence, South Carolina 29501

Re: The State v. Ronald DeRay Skipper

Dear Mr. Dusenbury:

The Court has refused your Petition for Rehearing in the above case in the following Order:

"Petition Denied.

s/ BRUCE LITTLEJOHN, C.J.
s/ J. B. NESS, A.J.
s/ GEORGE T. GREGORY, JR, A.J.
s/ DAVID W. HARWELL, A.J.
s/ A. LEE CHANDLER, A.J.

April 3, 1985."

SUPREME COURT OF THE UNITED STATES

No. 84-6859

RONALD DERAY SKIPPER,

Petitioner

v.

SOUTH CAROLINA

On PETITION FOR WRIT OF CERTIORARI TO the COURT OF THE STATE OF SOUTH CAROLINA

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 15, 1985

Supreme Court, U.S.
FILED
DEC 10 1985
JOSEPH F. SPANIOL, JR.
CLERK

(6)

No. 84-6859

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RONALD DERAY SKIPPER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of South Carolina

BRIEF FOR PETITIONER

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34 pp

QUESTION PRESENTED

In this capital case, did the exclusion of mitigating evidence tending to show that petitioner would probably make a favorable adjustment to prison if his life was spared violate petitioner's rights under *Lockett* v. *Ohio* and *Eddings* v. *Oklahoma*?

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported as *State* v. *Skipper*, ___ S.C. ___, 328 S.E.2d 58 (1985), and is reproduced in the Joint Appendix [J.A.] at 15-23. The *per curiam* order of the Supreme Court of South Carolina dated April 3, 1985, denying petitioner's timely petition for rehearing is unreported, and is reproduced at J.A. 24.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3), petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the South Carolina Supreme Court was entered on February 12, 1985. A timely petition for rehearing was denied by that court on April 3, 1985. The petition for certiorari was filed on June 3, 1985, and was granted on October 15, 1985.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the eighth amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

It further involves the fourteenth amendment to the Constitution of the United States, which provides in pertinent part:

> "[N]or shall any state deprive any person of life . . . without due process of law . . ."

This case also involves S.C. Code §§ 16-3-20 *et seq.* (1984) which provide in pertinent part:

> § 16-3-20 (A) A person who is convicted or pleads guilty to murder shall be punished by death or by imprisonment for life . . .
>
> (B) Upon conviction . . . of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or to life imprisonment. . . . In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of punishment. . . .
>
> (C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any . . . statutory aggravating and mitigating circumstances which may be supported by the evidence. . . .

STATEMENT OF THE CASE

As summarized by the South Carolina Supreme Court, the facts of the crime for which petitioner Ronald DeRay Skipper was convicted and sentenced to death are as follows:

> On the evening of November 1, 1982, Maryanne Wray (victim) went with two friends to the Rainy Day Inn in Garden City. Around 11:00 p.m. she left with Appellant, telling her friends that they were going to the beach. Later, her friends saw Appellant and the victim on the beach, embracing. When she did not return to the Inn, the friends left around 2:00 a.m.
>
> The victim's body was found the next morning at a house near the Garden City pier; she had been strangled.

State v. *Skipper*, ___ S.C. ___, 328 S.E.2d 58, 59 (1985), J.A. 15-16.

Following discovery of Ms. Wray's body, witnesses identified Skipper as the person seen kissing her on the beach shortly before her disappearance. *State* v. *Skipper*, Transcript of Record (hereinafter cited as "Tr.") at 491, 772. He was arrested several days later and charged with her murder.

Skipper spent most of the next seven and a half months in the Horry County jail awaiting trial. His case was finally called for trial on June 20, 1983. He pled not guilty and was convicted by a jury of murder and first degree criminal sexual conduct.

Two days after the guilty verdicts were returned, a sentencing hearing was conducted before the trial jury pursuant to the provisions of S.C. Code § 16-3-20 (1984 Cum. Supp.) for the purpose of determining whether petitioner should be sentenced to life imprisonment or to death by electrocution. Immediately before the beginning of the testimony at the sentencing hearing, the trial judge asked defense counsel to specify the statutory mitigating circumstances on which Skipper relied.[1] Counsel

---

[1] The South Carolina capital sentencing statute under which this case was tried is identical in almost all material respects to the Georgia statute considered in *Gregg* v. *Georgia*, 428 U.S. 153 (1976) and *Zant* v. *Stephens*, 462 U.S. 862 (1983). The only pertinent difference is that South Carolina's statute, unlike Georgia's, includes a list of nine statutory mitigating circumstances which are to be expressly called to the sentencer's attention when supported by the evidence. S.C. Code § 16-3-20(C)(b)(1)-(9) (1984). The sentencing jury may not, however, limit its consideration to these statutory mitigating circumstances, and must be instructed to consider any other mitigating circumstances "otherwise allowed or authorized by law." *State* v. *Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982), *cert. denied*, 460 U.S. 1103 (1983).

responded by stating, among other things, that

> [t]he general mitigating circumstances, of course, will be the biographical life of the defendant, his ability to be rehabilitated. In that regard we have subpoened two jail guards, and Mrs. Carolyn Henry who is a visitor in the jail on a regular basis, and has conferred with the defendant once a week since his confinement.

Counsel conceded at this juncture that certain decisions of the South Carolina Supreme Court had indicated that "the ability of the defendant to adjust to a life sentence or to extended confinement in custody . . . was not relevant."[2] As defense counsel began to explain his position with regard to this evidence, the trial judge stated that he would rule on the admissibility of the evidence at the proper time. J.A. at 3-4.

The prosecution then proceeded to introduce in aggravation of punishment evidence to show that petitioner had committed sexual assaults on other women prior to the murder of Ms. Wray. Tr. 1007-1022. After this evidence had been admitted, petitioner was afforded his opportunity to present evidence in mitigation.

The first witness to testify in mitigation was petitioner himself. While most of his testimony concerned his family

---

[2] As will be discussed below in greater detail, the primary case to which counsel was referring was *State* v. *Koon*, 278 S.C. 578, 298 S.E.2d 769 (1982). In *Koon*, which was decided six months before petitioner's trial, the South Carolina Supreme Court upheld the exclusion (by the same trial judge as presided in petitioner's case) of mitigation testimony by a psychiatrist to the effect that the defendant would in all likelihood prove adaptable and nonviolent in prison if given a life sentence. *See Patterson* v. *South Carolina*, ____ U.S. ____, 105 S.Ct. 2056, 2057-2058 (1985) (Marshall, J., dissenting from denial of certiorari).

background and his problems with drugs, he did mention that he had been free of drugs since the beginning of his incarceration nearly eight months prior to the trial. He also stated that if he were given a life sentence rather than sentenced to death, he hoped that he would be able to work in prison and help support his family. J.A. 4-5. He admitted that, immediately after his arrest, he had had some disagreements with the jail authorities over his right to make phone calls and to have his personal belongings, but he asserted that after this initial period he had gotten along well with the custodial staff at the jail. J.A. 5-6. On cross-examination, the prosecutor concluded his questioning of petitioner with the following exchange:

> Q. You are the fellow that when you got to the Horry County jail went to kicking the cell, right?
>
> A. Yes, sir.
>
> Q. That's you. That's the kind of fellow you are, but you are nice today, right?
>
> A. (No response).
>
> MR. DUNN [prosecuting attorney]: I have no further questions.

J.A. 7.

Skipper's next witness in mitigation was his ex-wife, Pamela Anderson Skipper. Mrs. Skipper described the defendant as the product of a violent and turbulent home life, and related a history of drug and alcohol dependence and emotional disturbance. Tr. 1069-1093. She also testified that Ronald had told her of having been repeatedly raped in prison while serving a Youthful Offender sentence for statutory rape, and she described how he suffered from nightmares which appeared to stem from this experience. J.A. 8-9. Later in her testimony she re

counted her former husband's efforts to seek treatment for his psychiatric problems. Mrs. Skipper described Ronald as having been "upset" when he was first arrested for Ms. Wray's murder, and she recounted her unsuccessful efforts to visit him early in his incarceration. J.A. 9-10. At this juncture, the following exchange occurred:

> Q. [by Mr. Dusenbury, defense counsel]: Now, since that period when you and Ronny were upset, I ask you whether or not what type of adjustment he made to prison life?
>
> A. He has made a good adjustment.
>
> Q. What is your opinion as to whether or not he could be—
>
> MR. DUNN: Object to, "What is your opinion." It can't be relevant. She is not qualified as an expert of any kind.
>
> THE COURT: Mr. Dusenbury?
>
> MR. DUSENBURY: I think she is well qualified.
>
> THE COURT: Let's hear the rest of your question and then I will decide.
>
> Q. What is your opinion from your knowledge of Ronny and his reaction to authority under the present conditions, and under prison conditions over an extended period of time: what is your opinion as to whether he could make a good adjustment?
>
> THE COURT: Objection sustained.
>
> MR. DUSENBURY: Your Honor, we would like to take up a matter of law outside the presence of the jury.
>
> THE COURT: I refer you to the case of State against Koon. I am familiar with the law. . . .

(The following took place outside the presence of the jury).

THE COURT: In the case of State versus Koon it says, "Appellant next alleges that the trial court erred by excluding certain psychiatric evidence concerning his future adaptability to jail. We disagree. The penalty phase of a capital murder trial is concerned with the existence [or] nonexistence of mitigating or aggravating circumstances involved in or arising out of the murder, not the convicted murderer's adaptability to prison life."

MR. DUSENBURY: Your Honor, we have under subpoena two jailers, Mr. Fritz Collins, Mr. Ronny Johnson, and a regular visitor Carolyn Henry to testify that the defendant has made a good adjustment.

THE COURT: Whether he can or cannot, State versus Koon says it is not an issue in this case.

MR. DUSENBURY: Even if they state after this initial period he has made a good adjustment?

THE COURT: Read State versus Koon. That is not an issue, whether he can adjust or not adjust.

MR. DUSENBURY: So none of these witness[es] will be permitted to testify?

THE COURT: I don't know what they are going to say, but I am telling you they will not be permitted to testify about his adjustability to prison life.

MR. DUSENBURY: That is the only thing we would offer them for. Thank you, Your Honor.

THE COURT: Anything further?

MR. DUSENBURY: No, sir.

THE COURT: Give us the jury, please.

J.A. 10-12.

After this ruling excluding the testimony of Carolyn Henry and the jailers, Skipper called as witnesses in mitigation his mother, sister and grandmother. Their testimony consisted largely of descriptions of petitioner's traumatic childhood and adolescence in a home environment dominated by alcoholism and continuous domestic violence. Tr. 1113-1169. None of these witnesses testified concerning petitioner's conduct in jail during the preceding seven-and-a-half months, although his mother did state, as had petitioner, that he had been free of drugs since the start of his pretrial confinement. Tr. 1148. During the testimony of petitioner's grandmother, Hazel F. Oliver, petitioner's counsel acknowledged that the trial judge had "already ruled on adjustment," and when the trial judge confirmed this, counsel concluded his examination without asking the witness any questions concerning the defendant's adjustment to prison. J.A. 12-13. After these witnesses had testified, Skipper rested his case in mitigation. Tr. 1169.

In sum, the trial judge's ruling excluding the testimony of the two jail officers and Mrs. Henry prevented the jury from considering any favorable testimony concerning Skipper's conduct or adjustment in jail, with the exception of that of his ex-wife and of Skipper himself. With the record in this posture, the prosecutor, knowing that the trial judge had refused to permit the favorable testimony of three impartial witnesses on this point, made the following argument to the jury:

> What kind of fellow is he? He told you, not me, something about an unlawful weapon. He was the lookout man in a stealing case when he was very young. Been in trouble all his life in some way or other. His wife said he told her—I didn't hear anybody else say it. He told her . . . that he had been raped in prison. With his history and what you know

> about him, who do you think the raper was and who do you think the rapee was? And if given the opportunity again with this four time sexual abusing loser, who do you think will get raped in prison? Will it be Ronald Skipper, big old Ronald Skipper who knocks woman [sic] in the side of the head, or will it be some little boy in prison.

J.A. 13-14. Later in his argument, while reviewing the list of mitigating circumstances submitted by the defense for the jury's consideration, the prosecutor noted that Skipper claimed to have "'shown significant and positive adjustments to confinement, and education and employment skills that enable him to be a stable and productive prisoner.'" The prosecutor responded to this assertion by recalling the one instance of Skipper's misconduct in pretrial confinement to which he had admitted on cross-examination, and suggested that this incident revealed his likely future conduct in prison:

> Didn't he admit kicking on the bars over there? That's the kind of prisorer he is. Kicking on the bar. Kicking on the bars . . .

J.A. 14.

After hearing arguments of counsel and the judge's sentencing charge, the jury deliberated about ninety minutes before returning a binding recommendation of death.

On appeal to the South Carolina Supreme Court, Skipper alleged, *inter alia*, that the trial court's exclusion of the mitigation testimony of the jail guards and of Mrs. Henry concerning petitioner's good adjustment to confinement during the eight months between his arrest and his trial violated the eighth amendment principle enunciated in *Lockett* v. *Ohio*, 438 U.S. 586 (1978). *State* v. *Skipper*, Brief of Appellant at 54-57. The South Carolina Supreme Court rejected this argument, and affirmed

petitioner's convictions and death sentence. The state supreme court's response to his *Lockett* argument, in its entirety, consisted of the following:

> Next, Appellant charges error in the refusal of the trial judge to permit testimony of Appellant's adjustment to prison life. We disagree.
>
> The trial judge properly refused to admit evidence of Appellant's *future* adaptability to prison life. *State* v. *Koon*, [278 S.C. 578, 298 S.E.2d 769 (1982)]. However, evidence of his past adaptability was admitted through testimony of his former wife, his mother and his own testimony. This contention is without merit.

State v. *Skipper*, ___ S.C. ___, 328 S.E.2d 58, 61-62 (1985); J.A. at 21 (emphasis in original).

Following denial of a timely petition for rehearing, petitioner sought review in this Court on the basis of two alleged deprivations of his federal constitutional rights. First, he asserted that the South Carolina courts' exclusion of evidence of his non-dangerousness in prison violated the eighth amendment principle of *Lockett* v. *Ohio*, 438 U.S. 586 (1978), by excluding relevant evidence in mitigation of his punishment. Secondly, he asserted that to the extent that the South Carolina Supreme Court had recognized the presence of constitutional error in the exclusion of mitigating evidence in his sentencing proceeding, it had violated the federal constitutional harmless error rule of *Chapman* v. *California*, 386 U.S. 18 (1967), in affirming his death sentence. On October 15, 1985, the Court granted certiorari limited to the first of these questions.

SUMMARY OF ARGUMENT

South Carolina recognizes the relevance of a capital defendant's future dangerousness to the sentencing

determination. Nevertheless, it has steadfastly refused to acknowledge the relevance, as a mitigating factor, of evidence of a defendant's character or prior record that shows that the defendant would probably prove nonviolent and cooperative in a prison environment if his life is spared. This prohibition violates the requirement of the eighth amendment expressed in *Lockett* v. *Ohio* that a capital sentencer may not be prohibited from considering in mitigation any relevant aspect of the defendant's character or record. In addition, because the state in this case sought to prove that petitioner would actually be dangerous in prison unless executed, while barring petitioner from responding with readily available evidence to the contrary, the death sentence imposed here violated well-settled due process principles.

ARGUMENT

I. South Carolina's Limitation On Mitigating Evidence.

The issue presented by petitioner's case is this: may a state prevent a capital defendant from attempting to persuade the sentencing jury, by competent evidence, that society would have nothing to fear from allowing him to live out his life in prison?

The pertinent South Carolina law is clear. Several months before petitioner's trial, the South Carolina Supreme Court approved the admission, in a capital sentencing proceeding, of psychiatric predictions that the defendant posed a danger of further acts of violence if he was permitted to live. *State* v. *Woomer*, 278 S.C. 468, 299 S.E.2d 317, 319-320 (1982), *cert. denied*, 463 U.S. 1229 (1983); *see also*, *State* v. *Plath*, 281 S.C. 1, 313 S.E.2d 619, 627, *cert. denied*, 104 S.Ct. 3560 (1984). Thus, the prosecutor's vigorous efforts to persuade the jury in this case that petitioner was an unruly prisoner who would proba-

bly rape other inmates if sent to prison for life were addressed to a sentencing consideration—the defendant's future dangerousness—which South Carolina law recognizes as relevant. But at the same time as South Carolina law places a capital defendant's future dangerousness in issue, it labels as irrelevant and inadmissible much of the evidence with which a capital defendant might attempt to meet the state's proof. For on the very same day that it decided *State* v. *Woomer*, the South Carolina Supreme Court declared in *State* v. *Koon*, 278 S.C. 528, 298 S.E.2d 769 (1982) (*Koon I*), that the likely future good conduct of a convicted murder in prison was not a valid consideration for a capital sentencing jury in deciding whether to impose a sentence of death or of life imprisonment.

The South Carolina court's explanation of this rule—much of which was incorporated verbatim in the trial judge's ruling in this case—was as follows:

> The penalty phase of a capital murder trial is concerned with the existence or nonexistence of mitigating or aggravating circumstances, not the convicted murderer's adaptability to prison life. The jury is concerned with the circumstances of the crime and the characteristics of the individual defendant as they bear logical relevance to the crime. In *Lockett* v. *Ohio*, cited as controlling in *Eddings* v. *Oklahoma*, the United States Supreme Court retained the court's traditional authority to exclude irrelevant evidence which did not bear on a defendant's character, prior record, or the circumstances of his offense. We conclude that the evidence of appellant's future conformity to prison life was properly excluded as irrelevant.

298 S.E.2d at 773-774.

South Carolina modified this rule some ten months after petitioner's trial to permit evidence of *past* good

conduct in jail or prison as proof of a defendant's general character. *State* v. *Koon*, ___ S.C. ___, 328 S.E.2d 625 (1984), *cert. denied*, 105 S.Ct. 2056 (1985) (*Koon II*). But it has steadfastly adhered to its conclusion, first expressed in *Koon I*, that a convicted murderer's probable future good conduct in prison was irrelevant and inadmissible. *State* v. *Stewart*, 283 S.C. 104, 320 S.E.2d 447, 450 (1984); *State* v. *Patterson*, ___ S.C. ___, 327 S.E.2d 650, 653 (1984), *cert. denied*, 105 S.Ct. 2056 (1985), *State* v. *Chaffee*, ___ S.C. ___, 328 S.E.2d 464, 471 (1984), *cert. denied*, 105 S.Ct. 1878 (1985), *State* v. *Elmore*, Opinion No. 22322 (S.C., May 16, 1985), *petition for cert. filed*, July 10, 1985 (No. 85-5087).[3] In no case since *Koon I*,

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[3] The practical significance of this seemingly rather arcane distinction is that it has permitted the South Carolina court to affirm almost every death sentence in which evidence of a capital defendant's past good conduct in jail or prison was erroneously excluded. *Koon II*, *supra*, *State* v. *Patterson*, *supra*, *State* v. *Elmore*, *supra*, *State* v. *Plemmons*, Opinion No. 22338 (S.C., June 3, 1985), petition for cert. filed, September 12, 1985 (No. 85-5411). The state court's reasoning in the majority of these cases was that since the erroneously excluded testimony concerning the defendant's good conduct in prison was relevant only insofar as it bore on his general character, the excluded evidence would have been "cumulative" to whatever other evidence of good character was admitted for the jury's consideration. Thus, for example, the court in *State* v. *Patterson*, *supra*, found that the erroneous exclusion of the defendant's excellent prison record over a period of nearly three years following his arrest did not require reversal because the evidence would have been cumulative to the testimony of several close family members, a neighbor and a minister concerning the defendant's good behavior as a child, and of an employer for whom the defendant had worked for a few months prior to his arrest. 327 S.E.2d at 653-654. Only in one case has the South Carolina court found the exclusion of evidence of past good behavior in jail to require reversal of a death sentence, and in that case the defendant had offered no other evidence in mitigation whatsoever, thus precluding a finding that his jail record would have been "cumulative" to other evidence of good character. *State* v. *Stewart*, 283 S.C. 104, 320 S.E.2d 447, 450 (1984).

moreover, has the South Carolina court made any effort to reconcile the holding of that case with any of this Court's death penalty decisions. For the reasons that follow, petitioner submits that such a reconcilation cannot be made.

II. The Rule Of *State* v. *Koon* Violates The Eighth Amendment Principles Of *Lockett*, *Jurek* And *Ramos*.

The South Carolina Supreme Court's blanket prohibition of evidence of a capital defendant's probable good conduct in confinement violates the eighth amendment principle that a capital sentencing authority "must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should *not* be imposed." *Jurek* v. *Texas*, 428 U.S. 262, 271 (1976) (emphasis added). Elaborating on this principle in *Woodson* v. *North Carolina*, 428 U.S. 280 (1976), the joint opinion of Justices Stewart, Powell and Stevens made clear that "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender . . . as a constitutionally indispensible part of the process of inflicting the penalty of death." *Id.* at 304. Two years later, a plurality of the Court explicitly held that a state legislature may not restrict the relevant mitigating circumstances which a capital defendant may place before the sentencer as reasons why his life should be spared. Writing for the plurality in *Lockett* v. *Ohio*, 438 U.S. 586 (1978), the Chief Justice explicated the eighth amendment principles of *Jurek* and *Woodson* as requiring

> that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 604 (emphasis in original). The *Lockett* plurality opinion continued:

> [A] statute that prevents the sentencer in all capital cases from giving independent weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Id. at 605. Since *Lockett*, a majority of the Court has repeatedly reaffirmed the requirement "'that there be taken into account the circumstances of the offense together with the character and propensities of the offender.'" *Eddings* v. *Oklahoma*, 455 U.S. 104, 112 (1982), quoting *Pennsylvania* v. *Ashe*, 302 U.S. 51, 55 (1937); *California* v. *Ramos*, 463 U.S. 992, 1000-1001 (1983); *and see Enmund* v. *Florida*, 458 U.S. 782, 827-829 (1982) (O'Connor, J. dissenting); *Caldwell* v. *Mississippi*, ___ U.S. ___, 105 S.Ct. 2633, 2650-2651 (1985) (Rehnquist, J., dissenting) ("capital sentencing juries must be allowed to consider all forms of mitigating evidence so as to facilitate individualized and rational determinations of the appropriateness of capital punishment").

While the South Carolina Supreme Court has accepted the *Lockett* principle in other contexts, *State* v. *Linder*, 276 S.C. 304, 278 S.E.2d 335, 339 (1981) (jury instructions must permit consideration of nonstatutory mitigating circumstances), it attempted to evade it here simply by declaring the question of a capital defendant's likely future behavior in prison to be "irrelevant" to the sentencing decision. *Koon I*, *supra*, 298 S.E.2d at 773. In so doing, the South Carolina court purported to rely on

Lockett's recognition of "the authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Id.*, *citing Lockett* v. *Ohio*, 438 U.S. at 604, n.12.

In cases subsequent to *Koon I*, moreover, the South Carolina court has suggested several additional rationales in support of its decision to bar capital defendants from presenting evidence of their likely future good behavior in prison. In *State* v. *Chaffee*, *supra*, the court seemed to suggest—in plain disregard of *Lockett*—that the issue of future conduct in prison was inadmissible because it was not included in the list of statutory mitigating circumstances in South Carolina's capital sentencing statute.[4] On another occasion, the state court defended its ruling in *Koon I* by stressing "the lack of logical connection between adaptability to confinement and the specific personality traits which were instrumental in leading the defendant to commit the crime at issue." *State* v. *Plath*, 281 S.C.1, 313 S.E.2d 619, 627, *cert. denied*, 104 S.Ct. 3560 (1984).[5]

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[4] Upholding the exclusion in *Chaffee* of psychiatric testimony concerning the adaptability of the defendant to the environment of prison life, the court stated:

> From a reading of the mitigating circumstances enumerated in the Code relating to the punishment for murder, it is obvious that the Legislature never intended that the judge and/or the jury gaze into the crystal ball and attempt to speculate on whether or not the prisoner would or would not conduct himself properly in prison. We find no error.

328 S.E.2d at 471.

[5] In *Plath*, the court acknowledged that South Carolina law permits the prosecution to introduce evidence of a capital defendant's future dangerousness in aggravation of his punishment, *State* v. *Woomer*, 278 S.C. 468, 299 S.E.2d 317 (1982), *cert. denied*, 463 U.S. 1229 (1983), while prohibiting the defense from presenting "testi-

South Carolina's extremely restrictive treatment of relevance under *Lockett* cannot be sustained because it is contrary to *Lockett* itself. For the mitigating factor that South Carolina has designated as irrelevant—the adaptability and likely future good conduct of an individual defendant in prison—is itself an aspect of the defendant's "character' that petitioner sought to prove here by evidence of his "record," as each of those terms is employed in *Lockett*. In reality, South Carolina has designated an aspect of petitioner's character—his capacity for living peacefully and even constructively in confinement—as irrelevant to the question of whether his life should be taken or spared. It was precisely because Ohio had created such an arbitrary prohibition against consideration of logically relevant aspects of the defendant's background and prospects for rehabilitation, as well as of mitigating aspects of the offense, that this Court struck down the Ohio death sentencing statute in *Lockett*. The constitutional defect here is of the same kind.

Indeed, South Carolina's exclusion of evidence concerning a capital defendant's future good conduct in confinement violates the rule of *Lockett* in an especially mis-

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mony about a defendant's potential adjustment to the controlled environment of life imprisonment." Although the court in *Plath* justified this seeming contradiction on the basis of the reasoning quoted in text, it conceded that the dividing line between these two types of evidence "is fine indeed." *Id.* at 627. In fact, by adopting a view of "relevancy" which designates a defendant's future dangerousness as relevant and his future nondangerousness in prison as irrelevant because only the former bears a "logical connection . . . to specific personality traits which were instrumental in leading the defendant to commit the crime," the South Carolina court has come dangerously close to defining as relevant only a defendant's bad characteristics—that is, those which made him into a murderer—while excluding any evidence of peaceful or redeeming qualities.

chievous way. This is so because it excludes probative evidence on an issue—the defendant's likely future conduct if he remains alive in prison—that a capital jury is almost certain to consider in its sentencing deliberations. Whether state law requires such consideration, *Jurek* v. *Texas*, 428 U.S. 262 (1976), encourages it, *California* v. *Ramos*, 463 U.S. 992, 1003 (1983), or merely permits it, *State* v. *Woomer*, 278 S.C. 468, 299 S.E.2d 317 (1982), in virtually every capital case the very fact that the defendant has been convicted of committing an aggravated murder naturally focuses the sentencing jury's attention on whether he is likely to commit further acts of violence unless executed. A jury attempting to discharge its legal and moral responsibility to the community will confront this difficult question in its deliberations, and will resolve it as accurately and fairly as possible.[6] Thus by excluding

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[6] As the Court has recently observed, our system of law presumes that capital juries address "'the truly awesome responsibility of decreeing death for a fellow human being . . . with due regard for the consequences of their decision.'" *Caldwell* v. *Mississippi*, ____ U.S. ____, 105 S.Ct. 2633, 2640 (1985), quoting *McGautha* v. *California*, 402 U.S. 183, 208 (1971). In assessing these consequences, jurors must draw on their own life experiences, and their personal moral, factual and legal judgment. *Barclay* v. *Florida*, 463 U.S. 939, 950 (1983) (plurality opinion). Recent public opinion survey research shows that Americans' support for the death penalty—and thus, to a substantial degree, the sentencing criteria of American jurors—is primarily based on concern over the danger of further acts of violence by convicted murderers. A nationwide survey by the Associated Press/Media General Poll reported earlier this year that a 42 percent plurality of death penalty supporters stated that the most important justification for capital punishment is "to protect society from future crimes that [the convicted murderer] might commit." By contrast, only 31 percent of respondents listed general deterrence as the primary purpose for the death penalty, while 17 percent cited punishment of the particular offender as the most important justification.

as "irrelevant" a defendant's proof that he would pose no further danger to society if confined for life, South Carolina has not removed the issue of his future conduct from the jury's consideration. All it has done is to create a wholly unnecessary risk that the jury's resolution of this issue will be based on incomplete and even misleading information, and that the defendant will therefore be sentenced to death in error. That is precisely what *Lockett* forbids. And that is what happened in this case.

Petitioner's argument is underscored by this Court's frequent recognition of the logical relevance of a defendant's future conduct as a consideration in capital sentencing. That a jury may consider a defendant's probable future behavior was settled beyond peradventure in *Jurek* v. *Texas*, 428 U.S. 262 (1976), where the Court upheld against eighth amendment challenge a state statute which placed the future conduct of the convicted murderer at the very center of the jury's sentencing deliberations. More recently, in *Barefoot* v. *Estelle*, 463 U.S. 880 (1983), the Court reiterated that "the likelihood of a defendant's committing further crimes is a constitutionally

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P. Harris, Public Attitudes Toward the Penalty of Death, Paper Presented at the Annual Conference of the American Society of Criminology, San Diego, Cal., Nov. 16, 1985; "Despite Fairness Issue, Death Penalty Support Rising," Rochester Times-Union, Jan. 29, 1985, at 1A. Such views concerning the value of the death penalty as a means of incapacitating dangerous offenders can provide an entirely appropriate framework for capital sentencing. *Jurek* v. *Texas*, 428 U.S. 262 (1976). But no such theoretical justification for capital punishment may serve as a reason to treat each convicted murderer as a member "of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death," *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976), without regard to whether the individual defendant on trial actually poses a danger of further violence.

acceptable criterion for imposing the death penalty." *Id.* at 896. *Accord, California* v. *Ramos*, 463 U.S. 992 (1983); *Spaziano* v. *Florida*, ___ U.S. ___, 104 S.Ct. 3154, 3163 (1984) (incapacitation of the offender is a legitimate consideration in capital sentencing). While the Court has stressed that a capital defendant's future behavior may be established in many different ways, *e.g.*, *Jurek* v. *Texas*, *supra*, (reputation in the community); *Barefoot* v. *Estelle*, *supra* at 896-906, (psychiatric prediction of future dangerousness); *Eddings* v. *Oklahoma*, 455 U.S. 104, 107-108 (1982) (psychiatric evidence that defendant might outgrow or be cured of personality disorder), the logical relevance of that future behavior, whether good or bad, is no longer open to question. Thus where, as here, evidence of a defendant's character and record suggests that his future behavior will be good, that evidence simply cannot be excluded as "irrelevant" without violating *Lockett*.[7]

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[7] Nor is the issue here affected by the fact that adaptability to confinement is only logically relevant so long as the defendant remains confined within "the controlled environment of life imprisonment." *State* v. *Plath*, 281 S.C. 1, 313 S.E.2d 619, 627 (1984). While this is obviously true it does not eliminate the relevance of the defendant's probable future conduct in prison. If the sentencing jury was being asked to choose between sentencing the defendant to death and releasing him into society, one might argue that the jury need not consider how he might conduct himself in prison. But the jury's actual choice is between sentencing the defendant to death and sending him to prison for many years or for life. In South Carolina, every convicted murderer not sentenced to death must be sentenced to life imprisonment, and may not be considered for parole release until he has served at least twenty years. S.C. Code § 16-3-20(A) (1984 Cum. Supp.). If the very remote possibility of a life prisoner's eventual release from confinement is a logical consideration in capital sentencing, *California* v. *Ramos*, 463 U.S. 992 (1983), the same must necessarily be said of his behavior during the course of an incarceration which is absolutely certain to occur should the defendant be

Petitioner does not, of course, suggest that his future conduct, whether in prison or out, is the only consideration relevant to sentencing. Nor does he argue that in assessing his future conduct, a sentencing jury may not consider his likely behavior in society as well as inside prison. *California* v. *Ramos*, *supra*, 463 U.S. at 1003. Indeed, evidence which tended to prove that petitioner would behave nonviolently and co-operatively in *any* future environment might be especially persuasive to a sentencing jury as a reason to spare his life. *See Lockett* v. *Ohio*, *supra*, 438 U.S. at 594 (favorable psychiatric prognosis for rehabilitation if defendant is returned to society). But all of this only states the obvious fact that there are many types of mitigating evidence, and suggests no reason why the evidence which Ronald Skipper actually offered at his trial—his adaptability and probable good behavior in prison—should have been kept from the jury charged with deciding his fate.

As pointed out above, the eighth amendment establishes the right of a capital defendant to offer and have considered by the sentencer any relevant evidence in mitigation of his punishment. *Lockett* itself makes clear, however, that each state retains control over the admission of evidence relevant to the proof of mitigating circumstances. *Id.* at 604, n.12. Thus where evidence can reasonably be regarded as irrelevant to the proof of a mitigating circumstance, nothing in *Lockett* or in petitioner's argument here would draw into question the right of a state court to exclude the evidence. For example, had

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sentenced to life imprisonment. Because a capital defendant's future dangerousness or nondangerousness is so largely a question of his likely future conduct *in prison*, the relevance of his institutional conduct in prison is obvious.

the trial judge here admitted the testimony of the witnesses proffered by petitioner to establish his adaptability to prison, *Lockett* would not have prevented the court from excluding identical testimony from numerous additional witnesses. *Cobb* v. *State*, 244 Ga. 344, 260 S.E.2d 60, 71 (1979) (*Lockett* and state law do "not imply . . . that the judge, in his discretion and inherent power to control the progress of trials, cannot limit the introduction of an endless quantity of cumulative testimony."). Similarly, the state court could properly have excluded incompetent opinion evidence concerning the defendant's likely future good behavior. *State* v. *Pinch*, 306 N.C. 1, 292 S.E.2d 203, 220, n.12, *cert. denied*, 459 U.S. 1056 (1982). Nor would *Lockett* be violated by the exclusion of evidence that another convicted murderer had made a successful and nonviolent adjustment to prison, where such evidence would have borne no relevance to *petitioner's* character or record.[8] *Lockett*, in sum, did not affect the states' authority to determine whether a particular item of evidence is relevant to the proof of a mitigating factor offered by a defendant in a capital case. What *Lockett* did establish was simply that a state cannot designate as "irrelevant" and inadmissible the mitigating factor itself.

It is significant that petitioner's position does not appear to have been so much as questioned in the large majority of capital punishment jurisdictions. So far as

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[8] For similar reasons, state and federal courts have held that *Lockett* does not require sentencing juries to consider testimony concerning religious objections to the infliction of capital punishment in all cases, *State* v. *Watson*, 449 So.2d 1321 (La. 1984), or describing the process of death by electrocution. *Shriner* v. *Wainwright*, 715 F.2d 1452, 1456 (11th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1328 (1984).

petitioner is aware, only one state besides South Carolina has upheld the exclusion of mitigating evidence of a defendant's likely future good conduct in prison, *State* v. *Pinch*, 306 N.C. 1, 292 S.E.2d 203, 220, *cert. denied*, 459 U.S. 1056 (1982), and in that case the North Carolina court's decision rested upon the alternate ground that the psychiatric opinion evidence proffered on the issue lacked an adequate foundation.[9] By contrast, the handful of other state supreme courts to have touched on this issue have uniformly assumed the relevance of competent evidence of a defendant's good conduct in prison. *State* v. *Watson*, 129 Ariz. 60, 628 P.2d 943, 945-6 (1981) (reducing death sentence to life imprisonment due in part to defendant's excellent prison record); *Delap* v. *State*, 440 So.2d 1242, 1257 (Fla. 1983) (defendant's conduct on death row prior to resentencing considered as mitigating circumstance); *Jordan* v. *State*, 464 So.2d 475, 484-486 (Miss.), *petition for cert. filed*, 54 U.S.L.W. 3004 (U.S. May 13, 1985) (No. 84-1783) (good conduct on death row prior to retrial);[10]

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[9] In view of this defect in the *Pinch* record, and since *Pinch* was decided before this Court's decisions in *California* v. *Ramos*, *supra*, and *Barefoot* v. *Estelle*, *supra*, it is difficult to say whether North Carolina would continue to question the relevancy of a defendant's likely future prison conduct if the issue were again raised upon an adequate record.

[10] Petitioner must concede that the basis of the Mississippi court's 5-4 decision in *Jordan* is by no means clear, since the majority approved the admission of some evidence of the defendant's good conduct in prison while upholding the exclusion of other very similar evidence. Whatever the merits of the Mississippi court's ultimate resolution of Jordan's *Lockett* claims, *see id.*, 464 So.2d at 486-491 (Robertson, J., dissenting), the majority opinion in *Jordan* does appear to acknowledge the legal relevancy, under *Lockett*, of a capital defendant's good conduct in prison as a mitigating circumstance. *Id.*, 464 So.2d at 484-485.

State v. *Sheffield*, 676 S.W.2d 542, 553 (Tenn. 1984) (mitigation testimony by law enforcement officers about defendant's conduct since his incarceration was "clearly admissible," citing *Lockett*); *see also State* v. *Teague*, 680 S.W.2d 785, 787 (Tenn. 1984) (evidence of defendant's adjustment to prison routine and good conduct in prison admitted in mitigation). Thus, it does not appear that any jurisdiction in the United States other than South Carolina has squarely rejected the future good conduct of a capital defendant in prison as a mitigating circumstance, while most of those states to have considered the question have recognized the logical and legal relevance of that issue to the capital sentencing decision. *Cf. Woodson* v. *North Carolina*, 428 U.S. 280, 291-295 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.) (states' capital sentencing practices as index of eighth amendment values).

If any further proof were needed of the logical relevance of a defendant's future good behavior in prison to a capital jury's sentencing decision, it was provided in this case by the prosecutor's efforts to persuade the sentencing jury that petitioner had in fact been badly behaved in jail and would probably rape other inmates in prison unless executed. J.A. 14. Of course, the trial judge's ruling excluding virtually all of petitioner's evidence on this point deprived petitioner of any opportunity to rebut these assertions. But quite apart from the fundamental unfairness of the prosecutor's argument under such circumstances, a matter which is discussed *infra* at 25-28, his remarks clearly concede the relevance of petitioner's future conduct in prison as a sentencing consideration.[11]

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[11] A somewhat similar acknowledgment is implicit in South Carolina's authorization of psychiatric predictions of capital defendants'

The error committed here requires that petitioner be resentenced. Because a capital sentencing jury "is free to consider a myriad of factors to determine whether death is the appropriate punishment," *California* v. *Ramos*, 463 U.S. 992, 1008 (1983), a precise evaluation of the impact of constitutional error on the sentencing process is normally impossible. *See*, *Gardner* v. *Florida*, 430 U.S. 349, 364 (1977). Rather, when this Court has determined that a capital sentencer has failed to consider all of the relevant mitigating evidence before imposing a sentence of death, it has recognized that the resulting risk of error requires resentencing. *Eddings* v. *Oklahoma*, 455 U.S. 104, 117 (1982) (O'Connor, J., concurring).

III. Under The Circumstances Of This Case, South Carolina's Refusal To Allow Petitioner To Rebut The State's Assertions Of His Bad Conduct And Future Dangerousness In Confinement Was Fundamentally Unfair.

Petitioner has argued here that under settled principles of eighth amendment jurisprudence from *Jurek* v. *Texas*, 428 U.S. 262 (1976) through *Lockett* v. *Ohio*, 438 U.S. 586 (1978) and *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982) to *California* v. *Ramos*, 463 U.S. 992 (1983) and *Barefoot* v. *Estelle*, 463 U.S. 880 (1983), a state may not exclude as "irrelevant" to the capital sentencing decision evidence of a defendant's character or record which is offered to show that he will prove to be co-operative and nonviolent in prison if his life is spared. But the process by

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likely future *dangerousness*, when such evidence is offered by the prosecution in aggravation of a capital defendant's punishment. *State* v. *Woomer*, 278 S.C. 468, 299 S.E.2d 317 (1982), *cert. denied*, 463 U.S. 1229 (1983); *and see State* v. *Copeland*, 278 S.C. 572, 300 S.E.2d 63, 76-77 (1982), *cert. denied*, 460 U.S. 1103 (1983) (opining that jury imposed death sentence on basis of psychologist's unfavorable prognosis concerning defendant's future conduct; sentence affirmed).

which South Carolina condemned Ronald Skipper to die was unfair and unconstitutional for yet another reason. Even if the states were to be permitted, despite *Lockett*, to designate as "irrelevant" mitigating factors which have traditionally been deemed central to the sentencing decision, the fact remains that both South Carolina law and the prosecution at Ronald Skipper's trial placed his future dangerousness in issue before the sentencing jury. All that was excluded at this sentencing hearing was Ronald Skipper's side of the story.

As noted in the Statement, the trial judge permitted the prosecutor to elicit from petitioner an admission concerning one isolated act of misconduct in pretrial confinement. When petitioner tried to meet this evidence of bad conduct by establishing, through the testimony of his jailers, that his conduct in pretrial confinement had actually been good, the trial judge invoked the rule of *State* v. *Koon* to prevent the jury from hearing this testimony. Then the solicitor argued to the jury that petitioner's one act of misconduct revealed his character and showed "the kind of prisoner" he would make. In addition, the prosecutor urged the jury to assume—on the basis of evidence that petitioner had been the *victim* of a homosexual gang rape in prison—that he had actually been the rapist and would rape other prisoners unless he was executed. Of course, when he made this emotional and seemingly persuasive argument, the prosecutor knew that the jail officials who had actually supervised petitioner in pretrial confinement for the better part of the past year were at the courthouse prepared to testify to petitioner's good conduct and adaptability to prison. But the jurors were not permitted to hear or consider this information, even though they could not have been expected to make an accurate evaluation of the prosecution's argument without it.

Under such circumstances, the procedure followed in this case plainly violated petitioner's fundamental right to present witnesses in his own defense. *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973); *Green* v. *Georgia*, 442 U.S. 95 (1979). Once the state had made an issue of petitioner's past and likely future conduct in prison, there can be absolutely no justification for the trial court's refusal to permit petitioner to rebut the state's assertions by competent evidence.

In the capital sentencing context, this elementary precept of due process is embraced by the eighth amendment principle that the sentencer "must be allowed to consider on the basis of all relevant information not only why a death sentence should be imposed but also why it should not be imposed." *Jurek* v. *Texas*, 428 U.S. 262, 271 (1976). In considering the admissibility of prosecution efforts to prove a capital defendant's future dangerousness, the Court has paid particular attention to whether the defendant has been afforded a fair opportunity to reply. *Ake* v. *Oklahoma*, ___ U.S. ___, 105 S.Ct. 1087, 1097 (1985); *Barefoot* v. *Estelle*, 463 U.S. 880, 898 (1983) (admission of evidence in American legal system based on assumption that factfinder will "have the benefit . . . of contrary evidence by the opposing party"). By denying petitioner such an opportunity in this case, the state compounded the already unacceptable risk "that the death penalty [would] be imposed in spite of factors which may call for a less severe penalty." *Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978).

Gardner v. *Florida*, 430 U.S. 349 (1977) expresses the Court's recognition of the fundamental nature of the right of rebuttal in a way which is especially germane here. In *Gardner*, the Court vacated a death sentence because the trial judge had imposed it after considering a confidential

presentence report which the defendant had not been permitted to rebut. The *Gardner* record did not reveal what was in the presentence report, nor whether the trial judge had been adversely influenced by it: the Court reversed "[b]ecause of the *potential* that the sentencer *might* have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny." *California* v. *Ramos*, 463 U.S. 992, 1004 (1983) (emphasis added).

What might have happened in *Gardner* manifestly did happen here. The prosecution was permitted to prove that Ronald Skipper would pose a danger in prison, and he was not permitted to respond.

As *Gardner* makes clear, no death sentence imposed in such a manner may be carried out. This case shows why. The murder of which petitioner was convicted involved no weapon and was not shown to have been premeditated. In mitigation, petitioner showed the ravages of a childhood of abuse and domestic violence. The facts of this case may well have rendered the jury's sentencing decision a close and difficult one. In such a case, the incremental effect of the prosecutor's predictions concerning petitioner's probable violent conduct in prison may have been the difference between life and death. For this reason, petitioner must be resentenced by a jury which has been permitted to hear and consider the evidence on both sides of this question, as well any other aspects of his character and record offered as a basis for a sentence less than death. *Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978).

CONCLUSION

For the foregoing reasons, petitioner submits that his sentence of death should be reversed, and his case remanded for resentencing.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

(7)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 84-6859

RONALD DeRAY SKIPPER, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

On Writ of Certiorari To
The Supreme Court of South Carolina

BRIEF OF RESPONDENT

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QUESTION PRESENTED

I.

Does the Supreme Court of South Carolina recognize and apply reasonably the Court's mandate in Lockett v. Ohio and Eddings v. Oklahoma that relevant mitigating evidence concerning a defendant's character and circumstances of the offense must be considered during a capital sentencing proceeding?

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RONALD DeRAY SKIPPER, Petitioner,

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On Writ of Certiorari To
The Supreme Court of South Carolina

BRIEF OF RESPONDENT

STATEMENT

The defendant was convicted of murder and first degree criminal sexual conduct (rape). He was sentenced to death and thirty (30) years imprisonment. His conviction and sentence were

affirmed by the South Carolina Supreme Court. State v. Skipper, ___ S.C. ___, 328 S.E.2d 58 (1985). (A. 15-23).

A distinction between the admissibility of lay witnesses' observations of past behavior in prison and predictions of future adjustment to prison life is recognized under South Carolina case law. Evidence of demonstrated past behavior in prison bears on a defendant's character and is relevant and properly admissible. A lay witness's prediction of future adaptability to prison life does not bear upon a defendant's character, prior record, or the circumstances of his offense, and is properly excluded from evidence since it is irrelevant.

During the sentencing phase of his trial, the defendant overlooked the distinction between admissible testimony

describing his past adjustment to prison life and inadmissible lay witness testimony predicting future adjustment to prison life. After freely introducing evidence of defendant's past good behavior in making a good adjustment to prison life, the defendant sought to introduce testimony from the same witness (his former wife) concerning her prediction as to his future adaptability to prison life. The Solicitor's objection to this latter testimony was sustained. The defendant then made an offer of proof concerning his past good behavior and good adjustment to prison life. The trial judge ruled that testimony of the defendant's "adjustability to prison life" was inadmissible. (A. 9-12). The trial judge admitted testimony into evidence

encompassing both past good behavior and some predictions of future adaptability:

1. Prior to asking his witness (defendant's former wife) about future adaptability to prison conditions and making his offer of proof, the defendant's counsel elicited, without objection, testimony that defendant had already made a good adjustment to prison life. (A. 10).

2. The defendant's mother testified that the defendant had been free of drugs since the date of his arrest. (Tr. p. 1148, lines 23-25).

3. The defendant testified that prison provided him with education in mechanics which complimented prior experience and training in the field and led him to set a lifetime career objective. (Tr. p. 1033, lines 11-16).

4. The defendant, a skilled mechanic, believed that he could work in prison at the minimum wage during the course of a life sentence and help his children get a good education. (Tr. p. 1033, line 17-p. 1034, line 17). (A. 4-5).

5. The defendant, by his own testimony, had made a good adjustment to prison life and wanted to do his time and get out of prison. The defendant liked his jailers; the jailers were good to him, and the defendant tried to be good to them. (A. 5-6).

On direct appeal to the South Carolina Supreme Court the defendant was concerned that his wife's testimony, Mrs. Henry's testimony (Carolyn Henry, a regular visitor [A. 11]), and his own testimony concerning his "up to then" adjustment to prison life should have

been admitted under State v. Koon, ___ S.C. ___, 328 S.E.2d 625 (1984), cert. denied, 105 S.Ct. 2056 (1985) and Lockett v. Ohio, 438 U.S. 586 (1978). (Brief of App., pp. 56-57). In his state appellate brief the defendant merely noted in passing that his wife was not permitted to answer and give her opinion concerning his potential for a good adjustment to prison life over an extended period of time. (Brief of App., pp. 54-55).

In light of the defendant's focus upon the argument that his "up to then' adjustment to prison life should have been admitted...." into evidence and the record before the court, the South Carolina Supreme Court found that the defendant's complaint was without merit.

> Next, Appellant charges error in refusal of the trial judge to permit testimony of

> Appellant's adjustment to prison life. We disagree.
>
> The trial judge properly refused to admit evidence of Appellant's future adaptability to prison life. State v. Koon, [278 S.C. 528, 298 S.E.2d 769 (1982)]. However, evidence of his past adaptability was admitted through testimony of his former wife, his mother and his own testimony. This contention is without merit. State v. Skipper, ___ S.C. ___, 328 S.E.2d 58 (1985) (A. at 21) (emphasis in original).

This Court granted certiorari limited to one question: "In this capital case, did the exclusion of mitigating evidence tending to show that petitioner would probably make a favorable adjustment to prison if his life was spared violate petitioner's rights under Lockett v. Ohio and Eddings v. Oklahoma?"

SUMMARY OF ARGUMENT

The rule of Lockett v. Ohio and Eddings v. Oklahoma requires that a capital sentencing jury be afforded the opportunity to consider any proffered mitigating aspect of the defendant's individual characteristics and the circumstances of the offense. The rule is properly applied when the sentencing jury's objective consideration is focused, and the risk of an arbitrary and capricious exercise of sentencing discretion minimized. The admission of any type of evidence which a defendant may proffer in mitigation -- so long as a sympathetically disposed trial judge conceives of no resulting prejudice -- can only insure the potential for arbitrariness in sentencing. Where the state court has held that evidence of actual past behavior in prison is

evidence of an aspect of a defendant's character and admissible, but evidence of a lay witness's prediction of future adaptability to prison life is irrelevant, a determination has been made affecting the focus of the sentencing jury's consideration, and this Court should not substitute its judgment.

I.

THE SUPREME COURT OF SOUTH CAROLINA RECOGNIZES AND APPLIES THE COURT'S MANDATE IN LOCKETT V. OHIO AND EDDINGS V. OKLAHOMA THAT RELEVANT MITIGATING EVIDENCE CONCERNING A DEFENDANT'S CHARACTER AND CIRCUMSTANCES OF THE OFFENSE MUST BE CONSIDERED DURING A CAPITAL SENTENCING PROCEEDING. NO REASONABLE INTERPRETATION OF THESE CASES REQUIRES THAT THEY BE APPLIED CONTRARY TO THEIR PURPOSE.

The South Carolina Supreme Court has consistently followed this Court's mandate that all relevant mitigating evidence of a defendant's character and circumstances of the offense must be considered during a capital sentencing proceeding. Nothing in either the Constitution or this Court's decisions require that the sentencing authority consider any and all supposed mitigating evidence which a defendant may propound. In practice where the sentencing authority is a jury, it is essential that Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982) be applied consistently with Gregg v. Georgia, 428 U.S. 153 (1976) to focus the jury's responsibility and minimize the risk of arbitrary and capricious action.

The trial record demonstrates some confusion between the nature of the evidence subject to objection and the nature of the evidence offered by the defendant to preserve his assignment of error for appeal. The defendant vacillates: He proposes testimony from jail guards and a jail visitor (Carolyn Henry) concerning his present ability to be rehabilitated (considered admissible by the trial judge as long as it demonstrated the defendant's characteristics, A. 3-4); he offers opinion concerning past adjustment (ruled admissible, A. 10); after an objection is sustained to a lay witness's opinion of future behavior, the defendant offers testimony, by the two jailers and the prison visitor, of an accomplished good adjustment to prison (A. 10-11); the defendant's complaint on

appeal to the South Carolina Supreme Court, with the exception of one brief note, is that his "up to then" adjustment to prison life should have been admitted (Brief of App. pp. 54-57) (emphasis added); the defendant now urges this Court's review of a question premised upon the claimed exclusion of mitigating evidence tending to show the probability of a favorable future adjustment to prison. (Brief for Pet. p. i).

The only thread of consistency throughout these offers of evidence and complaints is that all relevant evidence concerning the defendant's character and circumstances of the offense was admitted into evidence for the sentencing jury's consideration. The trial judge admitted into evidence all testimony plainly offered for the purpose of

proving the defendant's good conduct in prison (A. 5-10); (Tr. p. 1033, lines 11-16; p. 1148, lines 23-25). Additionally, the defendant himself was able to testify that in light of his positive accomplishments and good adjustment in prison, he looked forward to working in prison for the benefit of his children during a life sentence. (Tr. p. 1033, line 11-p. 1034, line 17; A. 4-6). The mitigating evidence which was, undeniably, presented to the sentencing jury -- demonstrating the defendant's good adjustment to prison and optimistic outlook for both a well adjusted and productive beneficial life during future imprisonment -- leaves the defendant no credible assignment of error. The defendant's assertion before this Court that the trial judge's rulings excluded mitigating testimony of two jail guards

and a jail visitor (Mrs. Henry) concerning his good adjustment to jail (Brief for Pet. pp. 8-9) is not fairly supported by the record. Insofar as the defendant wished to offer testimony of his good conduct and adjustment in jail which tended to prove his personal characteristics, the record demonstrates that it was admissible. (E.g., A. 3-6).

The trial judge excluded only one type of proffered mitigating evidence from the sentencing jury's consideration -- opinion testimony of lay witnesses (apart from the defendant himself) offered to predict the defendant's future adjustment to prison life. (E.g., A. 10). The Texas capital sentencing statutes require the jury to determine the likelihood of a defendant's continuing threat to society through the commission of future acts of

violence. In upholding the constitutionality of the statutes, this Court has noted that while predictions of future behavior and future criminal conduct are difficult, a prediction of future criminal conduct is often an element of decisions which are routinely made throughout the criminal justice system. "[A]ny sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." Jurek v. Texas, 428 U.S. 262, 274-275 (1976). The prediction of the defendant's future conduct is the sentencing jury's responsibility, and the jury must have before it "all possible relevant information about the individual whose fate it must determine." Id. at 275-276 (emphasis

added); accord, California v. Ramos, 463 U.S. 992, 1002-1003 (1983).

There is no more authority requiring the admissibility of lay witnesses' predictions as to an issue which must be ultimately passed upon by the jury than there is for placing the burden of sentencing a defendant upon the shoulders of witnesses. The admission of lay predictions of future adaptability to prison life places a speculative conclusion before the jury which may be an element of their decision in recommending a sentence of either death or life imprisonment. Lay witnesses are not more able than the jury to determine the defendant's likelihood of future good conduct. And there is no special knowledge or expertise that a lay witness can contribute to the jury's decision making

process. The general rule is that the opinion of a lay witness is improper and irrelevant where the jury is able to draw and form its own opinion from matters in evidence. 7 Wigmore, Evidence §§ 1918, 1976 (Chadbourn rev. 1978); e.g., State v. Taylor, 57 S.C. 483, 35 S.E. 729 (1900). Permitting a lay witness to offer speculative opinion as to future conduct can only remove a prospective element of the jury's sentencing decision and confuse the jury with extraneous personal opinions that second guess the jury's responsibility and introduce an arbitrary factor into the deliberative process.

"Whether the individual is mentally ill and dangerous to either himself or others...turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists."

Addington v. Texas, 441 U.S. 418, 429 (1979), cited in Barefoot v. Estelle, 463 U.S. 880, 898 (1983). Expert testimony concerning opinions of future dangerousness is admissible during the sentencing phase of a capital proceeding and is subject to testing through the adversary process -- including, of course, the defendant's presentation of his own side of the case and the opposing views of the defendant's doctors. Barefoot v. Estelle, 463 U.S. 880, 896-902 (1983). The South Carolina Supreme Court has held that expert testimony predictive of future dangerousness is admissible and subject to confrontation through the adversarial process during the sentencing phase of a capital proceeding, State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982), and is relevant information for the jury's

consideration of the defendant's individual characteristics and the circumstances of the crime. State v. Plath, 281 S.C. 1, 15, 313 S.E.2d 619 (1984), citing Barefoot v. Estelle, 463 U.S. 880 (1983). In the instance of indigency South Carolina provides that funds not exceeding $2,000 for expert services may be obtained through an ex parte proceeding (nunc pro tunc when necessary) before the court. South Carolina Code 1976 Section 16-3-26 (B) (1984).

The availability of jury sentencing in a capital case is desirable because it links the penal system with contemporary community values. But since the members of a sentencing jury will not have had experience in the sentencing process, sentencing information which enlightens and focuses the sentencing

jury upon the circumstances of the offense and the character of the offender is required in order to minimize the risk of arbitrary and capricious action. The admission of only relevant evidence concerning the crime and defendant is one means by which the jury can be carefully and adequately guided in their deliberations. Gregg v. Georgia, 428 U.S. 153, 188-195 (1976). This is entirely consistent with the constitutional mandate that the sentencing authority "have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence." Id., at 189 n. 38. (emphasis added).

"A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be

imposed, but also why it should not be imposed." Jurek v. Texas, 428 U.S. 262, 271 (1976) (emphasis added). The consideration of mitigating circumstances is required by the Eighth and Fourteenth Amendments and necessary to avoid unconstitutional mandatory capital sentencing procedures. Id. The capital sentencing procedure properly "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." Id., at 273-274.

Furman v. Georgia, 408 U.S 238 (1972) mandates that the sentencing body in a capital case must exercise discretion in a manner which is "suitably directed and limited so as to minimize the risk of wholly arbitrary and

capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976). These requirements are met when the sentencing authority's discretion is directed to the examination of "specific factors" in favor of or against the imposition of the death penalty. The examination of the specific factors themselves focuses the sentencer's attention upon the particularized circumstances of the individual offense and the individual offender. This is what directs and limits the exercise of discretion in imposing sentence. It is not necessary that the various factors submitted to and considered by the sentencer have any predetermined weight assigned to them. Proffitt v. Florida, 428 U.S. 242, 257-258 (1976).

Nothing more is constitutionally required to permit the jury to fully

examine the specific factor of a defendant's past behavior and conduct in prison. If this or any other lay evidence implies future adaptability to prison life, the jury is free to consider the evidence and either draw or decline any inference which may be urged. Nothing requires that a lay witness's prediction -- his own speculative inference drawn from weighing his previous personal observations -- of a defendant's future conduct in prison be admitted for the jury's consideration. The lay witness's opinion can only be his assignment of his own predetermined weight to his observations before they are submitted to the sentencing jury. Of course, the jury has no way of knowing what factors received any particular weight in forming any witness's opinion and prediction of the

defendant's future adjustment to prison. The admission of a lay witness's prediction of future adaptability to prison life can lead only to the imposition of needless arbitrary factors in the sentencing phase of trial -- instead of focusing the sentencer's attention upon the particularized circumstances of the individual offender -- and is then properly excluded. Assuming that a defendant's constitutional rights include the introduction into evidence of anything which he offers in mitigation -- so long as a sympathetically disposed judge conceives of no resulting prejudice -- can only insure arbitrariness in sentencing. Lockett v. Ohio, 438 U.S. 586, 631 (1978) (Rehnquist, J., concurring and dissenting).

The Eighth and Fourteenth Amendments generally require that the sentencer in a capital case consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (the Court held unconstitutional three exclusive statutory mitigating factors that generally precluded consideration of potential fundamental mitigating factors such as a defendant's individual culpability, intent to cause death, and age). Of course, nothing in Lockett "limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense. Id., at 604 n. 12. The

Court noted in Jurek v. Texas, 428 U.S. 262, 272-273 (1976) that the Texas Court of Criminal Appeals interpreted a statute "as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show[.]" This was in reference to the quoting of specified types of potential mitigating circumstances ([absence of] a significant criminal record; range and severity of prior criminal conduct; age of the defendant; whether defendant acted under duress or domination) from the Texas court's opinion. In this context "whatever mitigating circumstances [a defendant] may be able to show," never encompassed "any evidence which the defense attorney saw fit to present to a judge or jury." Lockett v. Ohio, 438 U.S. 586, 630

(1978) (Rehnquist, J. concurring and dissenting).

The decision of the South Carolina Supreme Court permits competent testimony of the likelihood of future nondangerousness and encourages the introduction of mitigating evidence which addresses the particular circumstances of an offense and the characteristics of the capital defendant. The opinions of lay witnesses predicting the future adaptability of a defendant to prison life and encompassing inane speculation as to "how often [the defendant] will take a shower or whether or not he will be lonely and withdrawn during [life imprisonment]," State v. Plath, infra, only contribute to arbitrariness in the sentencing proceeding and divert the jury. State v. Woomer, 278 S.C. 468, 299 S.E.2d 317, 319-320

(1982), cert. denied, 463 U.S. 1229 (1983) (predating Barefoot v. Estelle, 463 U.S. 880, holding that expert predictive testimony of future behavior may be admissible); State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982) (Koon I) (future adaptability to prison life inadmissible); (State v. Koon, ___ S.C. ___, 328 S.E.2d 625 (1984), cert. denied, 105 S.Ct. 2056 (1985) (Koon II) ("evidence of actual past behavior....offered by a defendant is clearly an aspect of [defendant's] character and would be admissible as a mitigating factor....[but] future adaptability to prison [is] irrelevant evidence because it does not bear on a defendant's character, prior record, or the circumstances of his offense"); State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627, cert. denied, 104 S.Ct. 3560 (1984)

(expert testimony bearing on future behavior admissible, but testimony concerning potential adjustment to prison life irrelevant since jury does not need to know about matters of a defendant's future personal hygiene and whether he might be lonely during confinement); State v. Stewart, 283 S.C. 104, 320 S.E.2d 447, 450 (1984) ("future adaptability to prison is irrelevant because it does not bear upon a defendant's character, past behavior in prison is relevant because it does bear upon a defendant's character"); State v. Patterson, ___ S.C. ___, 327 S.E.2d 650, 653 (1984), cert. denied, 105 S.Ct. 2056 (1985) (future adaptability to prison life inadmissible, past behavior admissible to show character); State v. Chaffee, ___ S.C. ___, 328 S.E.2d 464, 471 (1984), cert. denied, 105 S.Ct. 1878

(1985) (testimony of future "adaptability...to the environment of prison life" is not relevant for sentencing); State v. Skipper, ___ S.C. ___, 328 S.E.2d 58 (1985) (evidence of "future adaptability to prison life," is inadmissible); State v. Elmore, ___ S.C. ___, 332 S.E.2d 762 (1985), petition for cert. filed, July 10, 1985 (No. 85-5087) (three prison guards' testimony of adaptability to prison life and rehabilitative characteristics irrelevant and properly excluded, but lay testimony of guards would necessarily have reflected past behavior and character and was then admissible).

Nothing in the present case is even remotely comparable to the exclusion of the typical relevant mitigating evidence in Eddings v. Oklahoma, 455 U.S. 104 (1982) where the sentencing judge would

not, as a matter of law, consider even fundamental characteristics of the juvenile defendant -- his wretched upbringing, background, and emotional disturbance. Id. at 107-109, 113-115. It is inconceivable that the exclusion of the defendant's proffered testimony, which was only cumulative to other testimony in the record, violated any constitutional right. The Eighth and Fourteenth Amendments to the Constitution require that a capital trial must be fairly conducted and the defendant's constitutional rights scrupulously respected. There is no constitutional guarantee to trial procedures which may purport to be the best of all worlds, or which accord with enlightened ideas of social scientists, or those which meet individual predilections of members of the Court, or even those which would

require the introduction into evidence of "any sort of mitigating evidence which an accused or his lawyer wishes to offer...." Lockett v. Ohio, 438 U.S. 586, 632-633 (Rehnquist, J., concurring and dissenting), citing McGautha v. California, 402 U.S. 183, 221 (1971). The Court has not dictated "the weight that a sentencing court must ascribe to the various factors which might be categorized as 'mitigating' nor...suggest[ed] that this Court may substitute its sentencing judgment for that of state courts in capital cases." Eddings v. Oklahoma, 455 U.S. 104, 122 (1982) (dissenting opinion). The Court should not now substitute its judgment for that of the state court in finding that a defendant's offer of particular evidence in mitigation may, as a matter of law, propound matter which is

irrelevant and foster arbitrary action and hinder the jury's due consideration of the defendant's individual characteristics and the circumstances of the crime.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 15 1986
JOSEPH F. SPANIOL, JR.

No. 84-6859

IN THE

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OCTOBER TERM, 1985

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STATE OF SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of South Carolina

REPLY BRIEF FOR PETITIONER

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ARGUMENT IN REPLY

Instead of attempting to justify the South Carolina Supreme Court's designation of a capital defendant's likely good behavior in prison as "irrelevant" to the sentencing decision, respondent has devoted its entire brief to obscuring the constitutional violation which occurred in this case.[1] Essentially, the respondent denies the existence of the rule of *State* v. *Koon*, 278 S.C. 528, 298 S.E.2d 769 (1982) (*Koon I*), under which the trial judge excluded as irrelevant all impartial testimony tending to establish petitioner's past and likely future good conduct in confinement. Respondent then asserts that the trial judge excluded this evidence not on grounds of relevance, but only because it consisted of incompetent opinion testimony from lay witnesses. Brief of Respondent at 14.

There are three problems with this argument. First, it is contradicted by the record. Second, it ignores the South Carolina law which governed petitioner's trial. And third, even accepting respondent's factually and legally erroneous premises, the proffered testimony of petitioner's jail witnesses was competent and admissible under South Carolina evidence law, and its exclusion violated *Lockett* v. *Ohio*, 438 U.S. 586 (1978).

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[1] Respondent has not always been so diffident with respect to the constitutional issue presented here. In its Brief in Opposition to the petition for a writ of certiorari, respondent flatly asserted that "[a] defendant's future adaptability or conformity to prison life is irrelevant," and cited as authority the South Carolina Supreme Court's decisions in *State* v. *Koon*, 278 S.C. 528, 298 S.E.2d 769, 774 (1982) and *State* v. *Koon*, 285 S.C. 1, 328 S.E.2d 625 (1984), *cert. denied*, 105 S.Ct. 2056 (1985). The Brief in Opposition continued:

> Petitioner advances no convincing argument or authority as to why one's continuing enjoyment of life should be contingent upon his future adaptability to prison. Regardless of whether the future adjustment is good or poor the defendant would still be alive, and the continuance of his life in light of the commission of a particular crime is the question before the jury. The jury is simply not being called upon in a capital sentencing proceeding to choose an ordinary citizen who they [sic] feel will be a well-adjusted productive prisoner.

Id. at 3. This argument, which fairly summarizes the law of South Carolina as applied by the trial judge in this case, is nowhere to be found in respondent's brief on the merits.

1. **The Record Shows That The Testimony Of Petitioner's Jail Witnesses Was Excluded Solely Because The Trial Judge Regarded The Subject Of Petitioner's Conduct In Confinement As Irrelevant, And Not Because The Proffered Testimony Was Incompetent Or Unreliable.**

Respondent claims that the trial judge excluded the testimony of petitioner's three jail witnesses only because their testimony would have constituted incompetent lay opinion evidence. In fact, the excluded evidence actually consisted primarily of firsthand observations of petitioner's record of behavior in jail up until the time of his trial. Defense counsel's proffer consisted of the following:

> MR. DUSENBURY: Your Honor, we have under subpoena two jailers, Mr. Fritz Collins, Mr. Ronny Johnson, and a regular visitor Carolyn Henry to testify that the defendant has made a good adjustment.
>
> THE COURT: Whether he can or cannot, State versus Koon says it is not an issue in this case.
>
> MR. DUSENBURY: Even if they state after this initial period he has made a good adjustment?
>
> THE COURT: Read State versus Koon. That is not an issue, whether he can adjust or not adjust. . . . I am telling you they will not be permitted to testify about his adjustability to prison life.

J.A. 11. This colloquy belies respondent's suggestion that the trial judge excluded these witnesses only because he believed that they were being offered to make predictions concerning petitioner's future conduct which they were incompetent to express. On the contrary, the evidence was excluded because the trial judge believed, in conformity with the holding of *State* v. *Koon*, 278 S.C. 528, 298 S.E.2d 769, 774 (1982) (*Koon I*), that the entire subject of petitioner's past, present and future conduct in prison was irrelevant to the sentencing decision.[2]

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[2] Respondent's argument to the contrary may have been suggested by the fact that the proffer of petitioner's jail witnesses occurred shortly after defense counsel had attempted to elicit from petitioner's ex-wife an opinion concerning petitioner's capacity to make a good adjustment to prison. J.A.

Respondent places great emphasis on the fact that petitioner's trial counsel described the proffered testimony to the trial judge as relating both to petitioner's past good conduct and to his likely future good conduct in confinement. Brief of Respondent at 2-3, 11-12. Apparently, respondent wishes the Court to conclude from this that defense counsel intended to ask the jail witnesses no more than to express their opinions concerning petitioner's likely future conduct in prison. As noted above, the record plainly shows otherwise. Moreover, since defense counsel's purpose in proving petitioner's past good behavior in jail was obviously to permit the jury to draw the inference that his future behavior in prison would also be good, it is not surprising that counsel referred to his client's past and future good behavior in confinement as presenting one and the same issue. The phrasing of counsel's proffer is all the more understandable in view of the fact that at the time of petitioner's trial, South Carolina had not yet attempted to create any distinction between the admissibility of past and likely future good behavior in confinement. It was not until April, 1984, well after petitioner's sentencing hearing, that the South Carolina Supreme Court first made such a differentiation. In *State* v. *Koon*, 281 S.C. 1, 328 S.E.2d 625 (1984), *cert. denied*, 105 S.Ct. 2056 (1985) (*Koon II*), South Carolina reaffirmed its designation of a defendant's future good conduct in prison as "irrelevant," but acknowledged for the first time the relevance of *past* good behavior in prison—albeit only as proof of a defendant's general good character. Since *Koon II*

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10. The prosecutor objected to this question on the grounds that the witness had not been qualified as an expert and thus was not competent to express an opinion. The trial judge sustained the objection, but not on the basis urged by the prosecutor: by citing *Koon I* in excluding the evidence—a case in which the South Carolina Supreme Court upheld the exclusion of expert psychiatric opinion evidence on the same issue—the judge made clear that he was excluding the opinion testimony of Mrs. Skipper on grounds of the *relevance* of the entire question of petitioner's future conduct in prison, and not because of any concern over the competence of the particular evidence then being offered. Whether the evidence could fairly have been excluded as incompetent need not be decided, since petitioner has not challenged the exclusion of Mrs. Skipper's testimony in this Court, and the correctness of this ruling is thus not at issue here.

was decided more than nine months after petitioner's trial, trial counsel could hardly have been expected to frame his proffer in terms of the artificial distinction between past and likely future behavior which *Koon II* and other later South Carolina cases would seek to create.[3]

Respondent also insists that the trial judge "admitted . . . into evidence" other testimony tending to establish petitioner's past and future adaptability to prison, Brief of Respondent at 3-4, and that evidence of his past adjustment was "ruled admissible" at one juncture in the trial. *Id.* at 11. Respondent makes these assertions in an effort to persuade the Court, despite the explicit ruling of the trial judge excluding the entire subject of petitioner's conduct in prison as irrelevant, that such evidence would nevertheless have been admitted had it merely been proffered in some different way. The truth of the matter is that all such "rulings" consist of no more than the trial judge's failure to exclude evidence *sua sponte* absent an objection by

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[3] Indeed, until *Koon II* was decided, the respondent State of South Carolina insisted that evidence of a capital defendant's past adaptability to confinment presented the same legal issue—and was equally inadmissible—as evidence of his likely future adaptability. Some nine months after petitioner's trial, respondent was still arguing in the South Carolina Supreme Court that a capital defendant's past good behavior in jail was completely irrelevant to the capital sentencing decision, and that *Koon I* mandated its exclusion just as it mandated the exclusion of expert psychiatric predictions of a defendant's likely *future* good conduct in prison. *State* v. *Stewart*, 283 S.C. 104, 320 S.E.2d 447 (1984), Brief of Respondent at 11-12. In *Stewart*, the trial judge had excluded on the basis of *Koon I* the proffered testimony of several jail and stockade officials concerning the defendant's good behavior in pretrial confinement. The respondent's argument in *Stewart* as contained in its brief included the following assertions:

> [S]uch evidence was properly excluded. While evidence of past conduct in prison is not the same as evidence of future adaptability to prison life, the same rationale excludes both types of testimony. Neither type of testimony informs the jury of the circumstances of the crime or the characteristics of the individual defendant as they bear logical relevance to the crime. *See Koon, supra* . . . There is no "logical connection between adaptability to confinement and the specific personality or character traits which were instrumental in leading the defendant to commit the particular crime at issue." [*State* v.] *Plath*, [281 S.C. 1, 313 S.E.2d 619, *cert. denied*, 104 S.Ct. 3560 (1984)]. This reasoning applies to past as well as future adaptability.

the prosecution.[4] Since the trial judge did not make a single *sua sponte* evidentiary ruling during the course of petitioner's entire case in mitigation, Tr. 1023-1168, respondent's effort to create the impression of a considered determination of the admissibility of evidence concerning petitioner's adaptability to prison is disingenuous.

Finally, respondent has ignored South Carolina law by its argument that the admissibility of the testimony of petitioner's jail witnesses would have been treated differently by the South Carolina Supreme Court but for the manner in which trial counsel proffered the witnesses' testimony. In *State* v. *Stewart*, 283 S.C. 104, 320 S.E.2d 447 (1984), the state court applied *Koon II* to reverse a death sentence due to the erroneous exclusion of the mitigation testimony of jail officials despite the fact that defense counsel had proffered these witnesses' testimony as bearing only on the defendant's "future adaptability to life in prison." Rejecting an argument rather similar to the one which respondent now advances in this Court, the South Carolina Supreme Court in *Stewart* agreed with the defendant that the trial judge "should have realized that the lay testimony [of the jailers] would necessarily have included appellant's past behavior in jail. . . ." 320 S.E.2d at 450. While the state court characterized the proffer made by Stewart's trial counsel as "inartfully worded," and asserted that counsel "should have made clear the testimony of the stockade and jail officers would involve appellant's past behavior in prison," it nevertheless found the trial court's exclusion of the proffered testimony to constitute reversible error. *Id.* Compared to the proffer found to be adequate in *Stewart*, the proffer here was a model of clarity.[5] Thus respondent's suggestion that the South Carolina

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[4] That the prosecutor apparently saw no need to object to these comments by petitioner and his ex-wife is understandable, since the jury was likely to have discounted them as self-serving or biased.

[5] In *Stewart*, defense counsel proffered the testimony of a psychiatrist and a psychologist who were prepared to testify "that the defendant is a person who could be rehabilitated to life in prison." He added that "along the same lines" he also wished to call as witnesses several jail and stockade officers, but included no further explanation of their anticipated testimony. *State* v. *Stewart*, *supra*, Transcript of Record at 1089. The South Carolina Supreme Court reversed the death sentence solely because of the exclusion of the jailers' testimony which had been thus proffered at trial.

courts rejected petitioner's *Lockett* claim only because they understood him to have been seeking the introduction of incompetent lay opinion testimony is simply untenable.

2. The South Carolina Rule Applied At Petitioner's Trial Excludes Every Form Of Evidence Offered To Show Future Good Conduct In Prison.

Respondent pursues its claim that no competent evidence was excluded in this case by asserting that South Carolina law permits competent evidence of a capital defendant's likely future good conduct in prison, while excluding only incompetent lay opinion evidence. Brief of Repondent at 27. This assertion is false. In *State* v. *Koon*, 278 S.C. 528, 298 S.E.2d 769 (1982) (*Koon I*), the case which the trial judge quoted and applied in excluding petitioner's jail witnesses, the defendant had sought to introduce a prediction of future good conduct in prison from an eminently qualified psychiatrist who had examined the defendant prior to trial. No suggestion was made at trial or on appeal in *Koon I* that the witness was unqualified to offer such a prediction: the South Carolina Supreme Court held simply "that the evidence of appellant's future conformity to prison life was properly excluded as irrelevant." *Koon I*, *supra*, 298 S.E.2d at 773-774.[6]

There is no doubt that the South Carolina Supreme Court's holding in *Koon I* provided the rationale under which petitioner's jail witnesses were barred from testifying in this case. The trial judge, the Honorable Marion H. Kinon, was also the trial judge in *Koon I*. At the time of petitioner's trial, *Koon I* was the only decision of the South Carolina Supreme Court dealing with the admissibility of competent evidence of a capital defendant's likely good behavior in prison, and Judge Kinon cited and quoted from *Koon I* in excluding petitioner's jail

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[6] The psychiatric testimony excluded in *Koon I* is set forth verbatim in *Patterson* v. *South Carolina*, 105 S.Ct. 2056, 2058 n.3 (1985) (Marshall, J., dissenting from denial of certiorari).

witnesses.[7] Thus the record makes quite clear that the trial judge understood and applied *Koon I* as prohibiting, on grounds of relevance, any sort of evidence of petitioner's likely future good conduct in prison. The same is true of the South Carolina Supreme Court, which cited *Koon I* as authority for its conclusion that "[t]he trial judge properly refused to admit evidence of Appellant's *future* adaptability to prison life." J.A. 21 (emphasis in original). In sum, it is plain that *Koon I* was concerned only with the relevance of the issue of a capital defendant's likely future good behavior in prison, no matter how that likely future behavior was sought to be proved, and that this decision was applied in petitioner's case both at his trial and on appeal.

Nor do any subsequent South Carolina decisions correct the unconstitutionally narow view of relevance espoused in *Koon I*. In *State* v. *Koon*, 285 S.C. 1, 328 S.E.2d 625 (1984), *cert. denied*, 105 S.Ct. 2056 (1985) (*Koon II*), the state court again approved the exclusion of expert psychiatric testimony concerning a capital defendant's future adaptability to confinement, and reasserted its view first expressed in *Koon I* that "future adaptability to prison [is] irrelevant because it does not bear on a defendant's character, prior record, or the circumstances of his offense." 328 S.E.2d at 626. *Accord*, *State* v. *Chaffee*, 285 S.C. 21, 328 S.E.2d 464, 471 (1984), *cert. denied*, 105 S.Ct. 1878 (1985). In the face of these cases, respondent's representation to this Court that South Carolina law actually

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[7] Since petitioner's trial, moreover, Judge Kinon has continued to exclude expert predictions of future good behavior in confinement. In *State* v. *Raymond Patterson*, No, 85-GS-32-525, Transcript of Record at 917-918, 958, Court's Exhibit No. 1 (Lexington County Ct. of Gen. Sess., Sept. 3-7, 1985) (appeal filed S.C. Sup. Ct. Sept. 12, 1985), Judge Kinon refused to permit a capital sentencing jury to consider testimony by a highly experienced forensic psychologist who had evaluated the defendant and who was prepared to testify on the basis of that evaluation that the defendant "would be expected to have generally good relations with the authorities in the prison [if given life sentence] and to typically be seen as friendly and adaptable with relatively few conflicts." *State* v. *Raymond Patterson*, *supra*, Court's Exhibit No. 1 (psychological report of Dr. Diane R. Follingstad).

permits competent evidence bearing on the likely future good conduct of a capital defendant in prison is incomprehensible. Petitioner's witnesses were not permitted to testify solely because South Carolina law does not acknowledge the relevance of a capital defendant's likely good behavior in confinement, and for no other reason.

3. Even If Petitioner's Jail Witnesses Had Been Barred On Grounds Of Competence Rather Than Relevance, Such A Holding Would Have Violated *Lockett*.

Neither the record nor South Carolina law support respondent's suggestion that petitioner's mitigation witnesses were excluded only because they were offered to express lay opinions concerning his likely future behavior. But even if respondent was correct, the informed opinions of the jailers who had supervised petitioner for most of the seven-and-a-half months immediately preceding his trial concerning his likely future good conduct in confinement were undeniably relevant and admissible under *Lockett*.

This is so because such predictions by experienced correctional personnel, based on prolonged contact with and observation of petitioner in a correctional environment, would have constituted highly reliable evidence bearing directly on the crucial question of whether society could safely allow petitioner to live in prison. Whether such testimony is characterized as opinion testimony by lay witnesses, Fed. R. Evid. 701, or as the opinion of witnesses "qualified as . . . expert[s] by knowledge . . . [and] experience," Fed. R. Evid. 702, the firsthand observations and experience of such witnesses obviously place them in a position to assist the jury in answering the difficult task of assessing petitioner's likely future behavior in an environment with which the jailers are familiar and the jurors are not. Because "the realities of running a corrections institution are complex and difficult," *Rell* v. *Wolfish*, 441 U.S. 520, 547 n.29, (1979), the Court has often had occasion to acknowledge and defer to the "professional expertise" and "expert judgment" of correctional officials. *Pell* v. *Procunier*, 417 U.S. 817, 827 (1974). It is the daily business of jailers and prison officials to make reliable and accurate assessments of the prob-

able future behavior of individual inmates. Such day-to-day experience in the discharge of "one of the most vexing of all state responsibilities," *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 137 (1977) (Burger, C.J., concurring), unquestionably leaves jailers and prison officials better able than lay jurors to predict which inmates are likely to pose risks to institutional security and to other inmates and staff, and which are likely to become well-adjusted and cooperative during their confinement. Given the importance of such considerations to the jury's ultimate sentencing determination, it follows that mitigating evidence of this type cannot, consistent with *Lockett*, be withheld from the jury.

This argument in no way conflicts with South Carolina evidence law. Even if, as respondent insists, the opinions of petitioner's jailers are to be characterized as "lay" opinion testimony, South Carolina law excludes opinions and conclusions of laymen "only when they are superfluous in the sense that they will be of no value to the jury." *State* v. *McClinton*, 265 S.C. 171, 217 S.E.2d 584, 586 (1975); Dreher, *Evidence Law in South Carolina* 16-18 (Thames ed. 1979). Thus there can be little doubt that were South Carolina to acknowledge the relevance of the subject of a capital defendant's future behavior in confinement as a sentencing consideration, opinion testimony from jailers who have had direct custody and control of the defendant for a prolonged period of time would be freely admissible as a matter of state evidentiary law. *Accord*, Fed. R. Evid. 701; McCormick, *Evidence* 26-29 (3d ed. 1984).

In making this argument, petitioner does not disagree with the very general views expressed by the *amici curiae* brief. Just as *Lockett* does not require the sentencer to consider evidence which is irrelevant to the record and character of the individual defendant or the circumstances of the particular crime, so neither does it require the admission of incompetent and unreliable evidence. *See* Brief of Amici Curiae Alabama *et al.* at 6-7. The *amici* brief is primarily of interest in this regard for its failure to cite even a single case in which any state or federal court has construed *Lockett* to require the admission of unreliable and otherwise incompetent evidence. The *amici* do

point to the records of several Texas trials, each conducted nearly a decade ago, in which capital defendants made unsuccesful attempts to inject certain arguably extraneous matters into the sentencing juries' deliberations. Brief of Amici Curiae Alabama *et al.* at 3-4, nn.2-5. The fact that this evidence was excluded, and the exclusions apparently upheld on appeal, can scarcely be said to support the amici briefs pessimistic view of the present administration of the *Lockett* rule in the state courts. On the contrary, the paucity of evidence offered in support of the amici's request for an advisory opinion from this Court on the proper scope of *Lockett* strongly suggests that *Lockett*'s bright-line rule has served its intended purpose well.[8]

CONCLUSION

For the foregoing reasons, and for those set forth in his opening brief, petitioner submits that his sentence of death should be reversed.

Respectfully submitted,

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[8] Equally indifferent to the facts of this case and to the question presented by the ruling actually made below, the *amici* brief restates the issue as whether a state may make and enforce reasonable judgments concerning the reliability of evidence in capital sentencing proceedings. *Id.* at 9, n.8; 9-10. In fact, South Carolina has never made any judgment that either lay or expert predictions concerning capital defendants' future behavior in prison are unreliable. Indeed, the prosecutor in this case urged the jury to make just such a prediction when he argued that petitioner would probably rape other prison inmates if he was given a life sentence. *See* Brief for Petitioner at 25-28. In their briefs, however, the *amici* and the respondent have neither justified nor even acknowledged the misleading and one-sided manner in which petitioner's jury was forced to consider the crucial question of his likely future behavior in confinement.

Supreme Court, U.S.
FILED
DEC 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 84-6859

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RONALD DeRAY SKIPPER,

Petitioner,

V.

STATE OF SOUTH CAROLINA,

Respondent.

On Writ of Certiorari to the
Supreme Court of South Carolina

BRIEF OF AMICI CURIAE, THE STATE OF ALABAMA, THE STATE OF ARKANSAS, THE STATE OF CONNECTICUT, THE STATE OF FLORIDA, THE STATE OF IDAHO, THE STATE OF MISSOURI, THE COMMONWEALTH OF PENNSYLVANIA, THE COMMONWEALTH OF VIRGINIA, THE STATE OF WASHINGTON, AND THE STATE OF WYOMING*

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NO. 84-6859

IN THE
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RONALD DeRAY SKIPPER,

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V.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

Amici curiae are states with differing evidentiary standards for sentencing hearings. Although amici curiae do not all have rules identical to the evidence principles followed by South Carolina in the present case, all recognize the need for readily enforceable rules that enable trial judges to ensure that evidence received at sentencing hearings is relevant and reliable. In a federal system, the precise contours of these rules should be allowed to vary from state to state so long as they comport with principles of fundamental fairness.

STATEMENT OF THE CASE

Amici curiae adopt the statement of the case made by Respondent, the State of South Carolina.

SUMMARY OF ARGUMENT

Amici will not duplicate the detailed analysis of case law that it is expected that South Carolina will provide. Instead, this brief concentrates upon issues of policy.

I.

Even though the sentencing hearing should admit all relevant evidence, trial judges must have room for discretion to exclude marginal evidence, or trials may be lengthened indefinitely or collateralized so that issues of importance are lost. Defendants have offered evidence in sentencing hearings ranging from photographs of execution equipment to statistical testimony challenging the legislature's enactment of capital punishment. While some states might admit the evidence in the case at bar, that holding probably reflects a judgment that exclusion is difficult to enforce rather than a judgment that this extremely marginal evidence has substantial relevance. Rulings on relevance issues will normally differ from jurisdiction to jurisdiction. and most codifications of evidence rules provide the judge with considerable discretion. Fed. R. Evid. 403, for example, allows the trial judge to balance relevance against such factors as delay, confusion, time consumption, cumulative evidence, and prejudice. In a federal system, South Carolina's approach should not be prohibited by the Constitution.

II.

The principle admitting relevant information at the sentencing hearing should not remove traditional rules governing the form and reliability of evidence. If extended to its extreme, such a principle might nullify the hearsay rule and cause the admittance of a wide variety of evidence that traditionally has been excluded on reliability grounds. For example, the federal rules require personal knowledge and exclude lay witness opinions that the trial judge in his discretion finds not rationally based on perception or helpful to the trier of fact. Lay witness speculation about other persons' states of mind or possible future behavior, of the kind at issue in this case, is precisely the sort of evidence that has been excluded under these principles.

ARGUMENT AND AUTHORITIES

I. IN A FEDERAL SYSTEM, STATES SHOULD HAVE REASONABLE ROOM FOR DIFFERING RULES GOVERNING THE IDENTIFICATION AND EXCLUSION OF EVIDENCE THAT IS UNRELATED TO THE ISSUES.

Although the admissibility of evidence at the sentencing hearing is broad, and this Court has stated that all "relevant" [1] information should be allowed, logically there must be limits; otherwise, the sentencing hearing could be lengthened indefinitely and collateralized so that issues of importance were lost. Furthermore, the adversary system may induce lawyers to divert the jury from its duty. For example, in actual cases, different defense attorneys have offered evidence consisting of photographs of the electric chair; [2] presentation of the defendant's entire family, standing in a row, for jury view; [3] testimony of other persons sentenced to death in other cases but granted new trials (offered for the purpose of causing jurors to ignore issues in the case on trial and to reach the desired result simply because another case has resulted in an apparently inadequate penalty); [4]

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1 *Jurek v. Texas*, 96 S.Ct. 2950, 2958 (1976); *see also Gregg v. Georgia*, 428 U.S. 153, 206 (1976); *cf. Lockett v. Ohio*, 438 U.S. 586, 601, 604 (1978).

2 This evidence was offered, for example, in *State v. Sierra*, No. 214983 (209th Dist. Ct. Harris County, Texas, July 7, 1976). Interview with L. H. Stewart, Assistant District Attorney, in Houston, Texas (Oct. 26, 1976).

3 This evidence was offered, for example, in *State v. Brock*, No. 213720 (178th Dist. Ct. Harris County, Texas, Oct. 25, 1976). *See* D. CRUMP & G. JACOBS, CAPITAL MURDER 74 (1977).

4 This evidence was offered, for example, in *State v. Sierra*, No. 214983 (209th Dist. Ct. Harris County, Texas, July 7, 1976). Interview with L. H. Stewart, Assistant District Attorney, in Houston, Texas (Oct. 26, 1976); *see* D. CRUMP & G. JACOBS, *supra* note 3, at 246. The evidence was excluded as irrelevant.

and testimony by statisticians or sociologists purporting to show that capital punishment does not deter or is otherwise unsuited to legislative goals. [5] In one case an appellate court actually wrote an opinion holding that a photograph, depicting the defendant when he was in the first grade, could be properly excluded. *Berard v. State*, ____ So.2d ____, No. 3-Div.-585 (Ala. Crim. App. July 31, 1984). The defendant had there assigned, as error, the trial court's ruling "in not allowing appellant's . . . photographs while growing up." *Id.*, slip op. at 14-15.

If capital trials are to be rational, the States must have authority to exclude marginal or irrelevant evidence in these and other categories. In a federal system, it is virtually certain that all States will not have identical views regarding evidence that is relevant to the issues, although they generally may have similar views regarding evidence with significant relationship to the issues. Even with respect to the most fundamental rights, this Court has said that constitutional rules must be read with "much leeway in application" by individual states. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975). In the capital punishment context, this Court has attempted to move away from "ritualistic adherence" to overly precise requirements. *Wainwright v. Witt*, 105 S.Ct. 844, 850, 852 (1985). And in another capital sentencing case, *Lockett v. Ohio*, 438 U.S. 586, 604 n.12 (1978) (emphasis added), the Court's plurality said: "Nothing in this opinion limits *the traditional authority of a court to exclude, as irrelevant,* evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."

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5 This evidence was offered, for example, in *State v. Sierra*, described in *supra* note 4. *See* authorities therein cited. Defendant there offered *both* expert and lay testimony to the jury on these statistical issues.

The trial court's ruling in *Sierra*, excluding this evidence as not relevant, was correct. The question whether adoption of a capital punishment statute is justified by deterrence, prevention or retributive considerations is a legislative one. To put that issue to individual jurors would be to create inconsistent results. The same inconsistency would follow from the general admittance of other kinds of irrelevant, unreliable evidence.

Unless state courts are given reasonable "leeway" to evolve rules of evidence that are reasonable, fair, and even-handed, trial judges, as a practical matter, will be forced to allow evidence that is of the most marginal relevance and that collateralizes the inquiry so as to divert the jury from the issues. Indeed, a creative defense attorney might well consider it his duty to test the trial court's rulings by offering diversionary evidence, pushing the limits of admissibility, in order either to detract attention from relevant evidence or to force the court into error. A request that the jury be transported to and allowed to view a place of employment because the defendant once planned to work there, or an offer of detailed testimony about an indiscretion by the victim a score of years ago when he was in grade school, are obvious examples of evidence that clearly should not be admitted, but that it is impossible to be certain every court would regard as devoid of *any* relevance to a material issue. [6] Indeed, it is possible to argue that such evidence would be more highly relevant than the testimony at issue in the present case, given its speculative and unreliable nature.

Shortly after this Court's decision in *Gregg v. Georgia*, 96 S.Ct. 2909 (1976), it was pointed out that "the tendency of lawyers to offer [inadmissible evidence regarding sentencing alternatives] may be expected to expand." Crump, *Capital Murder: The Issues in Texas*, 14 HOUS. L. REV. 531, 576 (1977).

> "Examples from actual practice include arguments to the jury that the death penalty makes jurors no better than the members of a firing squad; that in the celebrated *Leopold-Loeb* case the defendants were rehabilitated because they were not sentenced to death; and that capital punishment is unfair because police officers who peddle narcotics are not put to death even though more blameworthy than the defendant on trial."

Id. at 577.

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6 See *infra* note 8 and accompanying text.

Many States might regard the evidence in the present case as admissible; the decision to admit it, however, probably reflects a judgment that it is more problematic to enforce exclusion, rather than an evaluation of the evidence as having any great relevance.[7] Other States, such as South Carolina, may exclude this marginal evidence. In a federal system, that result should not be precluded under the Constitution.

While it is true that the scope of admissible evidence in the sentencing phase of a capital case is necessarily broad because of the scope of the issues presented, it should not become boundless. Rationality and principled decisionmaking have been considered essential to the constitutional imposition of the penalty of death. *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976). That goal cannot be advanced when the inquiry that may lead to a sentence of death is influenced by speculative, unreliable or collateral evidence, as it would be if admissibility were limited only by the imagination of counsel.

II. THE DUE PROCESS CLAUSE SHOULD NOT PREVENT STATES FROM SETTING REASONABLE STANDARDS FOR THE RELIABILITY OF EVIDENCE AND THE FORM IN WHICH IT IS ADMITTED, OR FROM EXCLUDING EVIDENCE THAT IS UNDULY SPECULATIVE AND CONJECTURAL.

If the requirement for admittance of "all relevant evidence" were taken overly literally, it would invalidate traditional evidence rules on a wholesale basis. For example, it would dispense with the hearsay rule. Much hearsay is obviously relevant;[8] it is

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7 *See infra* notes 10-11 and accompanying text (reliability of lay opinion evidence regarding future human behavior).

8 Relevant evidence means evidence having "any tendency" to make a fact that is of consequence to the determination of the action more or less probable. Fed. R. Evid. 402. This definition could

excluded, however, in every State and federal jursidiction, because it is generally unnecessary and untrustworthy.[8a] In this manner, the law encourages the presentation of evidence in reliable forms that can be tested by cross examination. Similarly, the law excludes unauthenticated objects, documents that are not identified, opinions requiring expertise offered by non-experts, offers of compromise, subsequent remedial measures, the existence of liability insurance, and many other kinds of evidence.[9] These items are excluded in virtually every American jurisdiction, even though they have demonstrable relevance.[9a]

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allow evidence that is either unreliable or collateral to the issues. Rule 403 therefore empowers the court to exercise discretion in excluding marginal evidence.

8a If the evidence qualifies under an exception to the hearsay rule (or if it is unusually trustworthy and necessary), its exclusion can sometimes be so prejudicial as to deny due process. *See, e.g., Green v. Georgia*, 442 U.S. 95 (1979) (exclusion of highly reliable and relevant declaration against penal interest by codefendant, offered in mitigation, held error). This Court's reasoning in *Green* was simply that the hearsay rule "may not be applied mechanistically to defeat the ends of justice." *Id.* at 97, *quoting Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). This principle applies to both capital and non-capital trials, as *Chambers* indicates.

Green, by implication, supports the principle that hearsay not falling within an exception, and not possessing particular indicia of reliability, *can* be excluded.

9 *See generally* C. McCORMICK, EVIDENCE (1984).

9a Opinions of polygraph operators, "truth serum" results, and opinions of other purported experts on veracity are excluded in most jurisdictions. Yet the States have been faced with demands that they must freely admit these opinions in capital cases as a consequence of the "all relevant evidence" standard. *Cf. Cooper v. State*, 336 So.2d 1133, *modified*, 437 So.2d 1070 (Fla. 1983). Surely the "all relevant evidence" standard does not mean that the states must admit any and every opinion of this kind, either for or against the defendant, regardless of its lack of reliability.

A rule excluding lay witness opinions that depart substantially from a basis of factual observation is well established. [10] The Federal Rules of Evidence, for example, exclude lay opinions unless they are (1) "rationally based on . . . perception" and (2) "helpful" to the trier of fact, and the Rules provide the trial judge considerable discretion to regard evidence as inadmissible on these grounds. Fed. R. Evid. 701.[10a] While the Rules ordinarily allow admittance of lay opinions in the nature of estimates, shorthand renditions of facts, descriptions of business routine, and like matters, evidence involving speculation about future possibilities is frequently excluded.[11] It is in precisely that category that the evidence at issue in the present case falls.

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10 *Cf.* C. McCORMICK, EVIDENCE 23-29 (1984). *See also* authorities cited *infra* note 11.

10a "Whether an inference is helpful or not is very much in the discretion of the court." C. McCORMICK, EVIDENCE 28 n.19 (1984). *See also* authorities cited *infra* note 11.

11 Wigmore states that "Knowledge must involve rational inferences from adequate data . . . . Thus it is that the law may reject testimony which appears to be founded" on "scanty" data. 2 J. WIGMORE, EVIDENCE sec. 659 (Chadbourne ed. 1979).

"Opinions as to the state of mind or emotion of another create special difficulties." M. GRAHAM, WEST'S HANDBOOK OF FEDERAL EVIDENCE 610 (1981). "The state of mind or emotion of another person is not, in the nature of things, susceptible of firsthand knowledge. Hence testimony directly on the state in question has been excluded." *Id.*; *see also United States v. Phillips*, 600 F.2d 535 (5th Cir. 1979) (testimony about another person's mental state said to amount to little more than witnesses "choosing up sides"); *United States v. Jackson*, 569 F.2d 1003 (7th Cir. 1978) (lay witness speculation about possible causes of another person's depression held properly excluded); *United States v. Popejoy*, 578 F.2d 1346 (10th Cir. 1978) (impression that someone knew of robbery held correctly excluded as improper attempt to interpret mind of another). *But cf. John Hancock Mut. Life Ins. Co. v. Dutton*, 585 F.2d 1289 (5th Cir. 1978).

In the case at bar, the evidence does not involve the *present* state of mind of another. Instead, it is more speculative; it is an effort to divine the *future* state of mind of another person and to predict his future behavior on that basis. This kind of lay witness

One may be better able to visualize the reason for exclusion of this evidence by imagining evidence offered by the prosecution that would be the counterpart of the evidence in question here. The prosecution might, for example, call a witness associated with the victim. If that witness were to offer his opinion that the defendant would adjust poorly to prison conditions and would commit acts of violence at every available opportunity, there might be States that would admit the evidence, but there would be others that would, reasonably, exclude it. [12] There is substantial ground for difference of

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opinion should be more readily subject to exclusion than the opinions discussed by Wigmore and Graham.

See also 3 J. WEINSTEIN & M. BERGER, EVIDENCE sec. 701(02) (1985) ("Rule 701 seeks to balance the need for relevant evidence against the danger of admitting unreliable testimony"); 3 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE 43, 618-627 (1979) (recognizing "an understandable reluctance of courts to allow the 'opinions' of lay witnesses where these seem to be mere speculation or guesswork, or amount to high flown conclusions based upon sparse data . . . .").

The issue is not whether the South Carolina trial judge's ruling in this case was or was not precisely the same application of these principles that another court might make. The important point, instead, is that South Carolina's holding is based upon a traditional and appropriate concern for the reliability of evidence, in which judges have always had necessary room for discretion. *See* note 10a *supra*. In a federal system, the Constitution should not prohibit this approach.

12 Petitioner Skipper's argument logically must be that this prosecution evidence is admissible, just as he argues that his evidence is admissible. First, the testimony of the contemplated witnesses is not given by an offer of proof. It remains possible that the effect of their testimony would be to reinforce the prosecution's view of the case, either on direct or on cross. In fact, cross examination, which entails leading questions, would be particularly likely to demonstrate that these witnesses' speculations could support inferences of violent behavior in the future. Furthermore, the prosecution presumably could call rebuttal witnesses whose opinions would differ from Petitioner's claims and who would speculate that Petitioner Skipper would frequently be violent in the future. For example, the prosecution might wish to call personnel from the Horry County jail, where Skipper was violent after the arrest in this case, to provide rebuttal opinions to the effect that Skipper would likely make a

opinion about the reliability of lay predictions of future human behavior. A State's decision to exclude such evidence should not be invalidated by the Constitution.[13]

CONCLUSION

In a federal system, States should not be considered in violation of the due process clause if they evolve varying principles for determining what evidence is relevant to the issues, so long as those rules are not fundamentally unfair. Likewise, the due process clause should not prevent the States from setting reasonable standards for the form and reliability of evidence offered at a capital trial in the sentencing hearing.

Respectfully submitted,

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poor adjustment. However, South Carolina should be able to confine testimony to disputes that are more relevant and reliable than these speculations.

13 This case illustrates "the importance of allowing the States to experiment and innovate, especially in the area of criminal justice." *Delaware v. Fensterer*, 54 U.S.L.W. 3301, 3302 & n.1 (U.S.S.Ct. Nov. 4, 1985) (per curiam) (Mr. Justice Stevens, concurring). "[N]either the constitution as originally drafted, nor any amendment, nor indeed any need, dictates that we have absolute uniformity in the criminal law in all the States." *Id., quoting California v. Green*, 399 U.S. 149, 171 (1970) (separate opinion of the Chief Justice).